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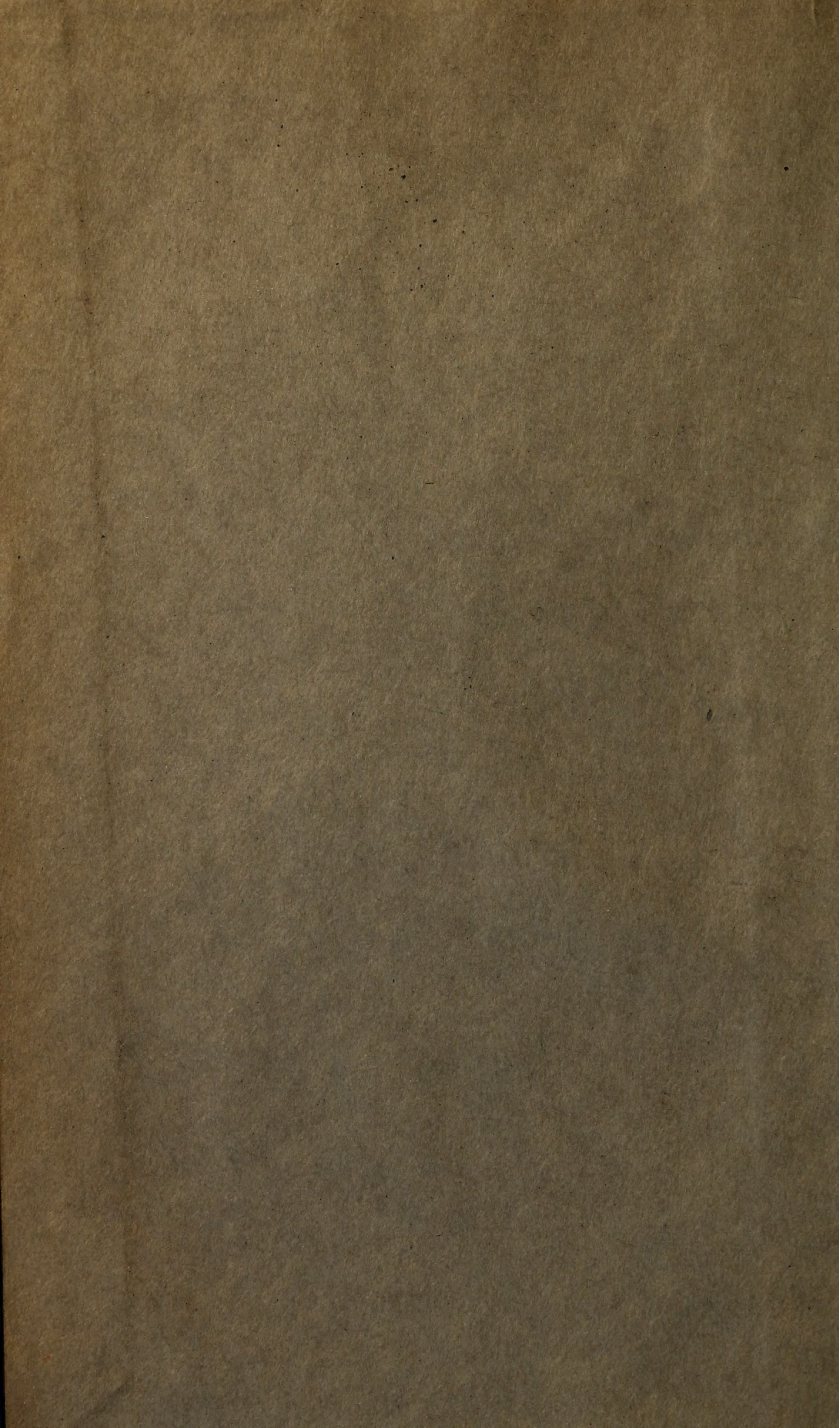
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JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor.

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History is past Politics and Politics present History—*Freeman*

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VOLUME VII

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SOCIAL SCIENCE,  
MUNICIPAL AND FEDERAL  
GOVERNMENT

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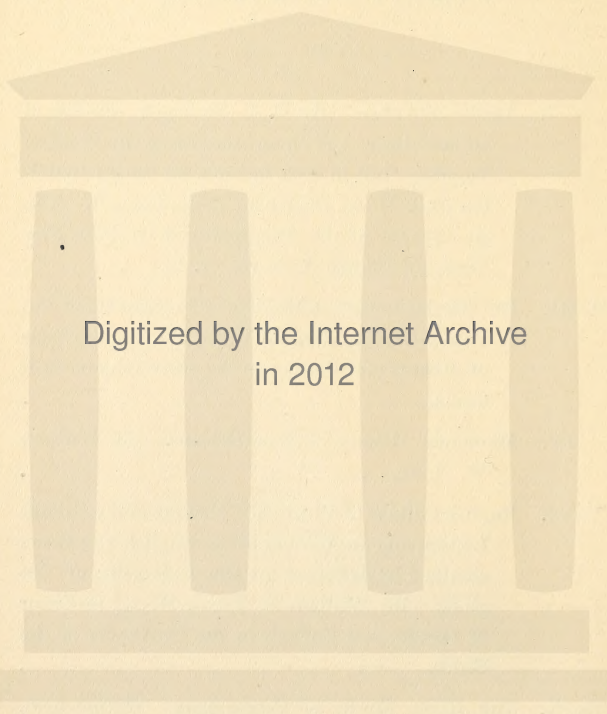
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I

ARNOLD TOYNBEE











ARNOLD TOYNBEE

1852-1883

JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History—*Freeman*

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SEVENTH SERIES

I

ARNOLD TOYNBEE

BY F. C. MONTAGUE

*Fellow of Oriel College, Oxford*

WITH AN ACCOUNT OF THE WORK OF TOYNBEE HALL IN EAST LONDON,  
BY PHILIP LYTTTELTON GELL, M. A., CHAIRMAN OF THE COUNCIL.

ALSO AN ACCOUNT OF THE NEIGHBORHOOD GUILD IN  
NEW YORK, BY CHARLES B. STOVER, A. B.

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BALTIMORE  
PUBLICATION AGENCY OF THE JOHNS HOPKINS UNIVERSITY  
JANUARY, 1889

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BALTIMORE.



# ARNOLD TOYNBEE.

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## I.

Arnold Toynbee, the second son of Joseph Toynbee, the distinguished aurist, was born on the 23rd of August, 1852, in Savile Row, London. Whilst he was yet an infant, his family removed to a house at Wimbledon in Surrey, where he spent the greater part of his childhood. Mr. Toynbee is remembered by friends to have taken the keenest interest in Arnold of whom, when only four years old, he spoke as his child of promise, and on whose development he exercised a very powerful influence. He was always anxious to improve the condition of the poor, and assisted in the erection of model cottages and the establishment of a lecture hall at Wimbledon. He employed Arnold whilst yet very young in the lectures upon elementary science which he used to give to the working-men of the neighborhood. Nor was it only by setting an example of public spirit that Mr. Toynbee did much to form the character of his son. He was a lover of art, a discerning collector of pictures, who knew how to communicate to others his enthusiasm for the works of great masters, and like all who sincerely love art, he took an especial delight in natural beauty. Wimbledon was then a pretty village situated in a fresh rural landscape, the fairest to be found in the immediate vicinity of London. In later years Arnold Toynbee would look back as to the happiest hours of childhood to those rambles over Wimbledon Common on which his father would take out a volume of poetry and as they rested in pleasant spots here

and there read aloud such passages as a child could feel at least, if not understand.

Whilst yet very young Arnold Toynbee delighted in reading history, especially military history, and his favorite pastime was to construct mimic fortifications, which he built with more than childish precision and armed with the heaviest ordnance procurable. Always delicate and exquisitely sensitive to pain, he had not the animal courage common to strong, healthy boys; yet, by the unanimous testimony of brothers and of schoolfellows, he was singularly fearless, throwing himself into everything which he attempted with an impetuosity which made him forgetful of consequences and even of actual suffering. With this high-strung vehemence he united a very resolute will. From first to last, he was one of those who would sooner be dashed to pieces than fail to climb any height which they have once determined to surmount. In later life these qualities were tempered by scrupulous anxiety to be just and fair, by a beautiful kindliness and delicacy; but in early youth they were accompanied with a violent temper, and an excess of self-confidence. He was but eight years old when he went to his first school, a private establishment at Blackheath, where he became the leader in amusement and mischief of boys much older than himself. Having once planned with many of his schoolfellows a joke to be executed when the master's back was turned, he failed to notice the entrance by an opposite door of another master and the hasty retreat of all his accomplices who left him alone in the middle of the floor, absorbed in the execution of a caricature for which he alone suffered, although all were guilty.

As a schoolboy and ever after he was slow in acquiring a knowledge of any subject distasteful to him, such as languages or mathematics, but showed great power in grasping any subject which, like history, fired his imagination. Rapidity of acquisition was never the distinguishing quality of his intelligence. A fastidious taste and eager passion for truth made half knowledge distasteful to him; and whole knowledge

comes readily to no man. At school he grew so decided in his preference for a military life that, when he was fourteen years of age, his father sent him to a college which prepared candidates for army examinations. Here he held his own among comrades who were not very congenial. He had a boy's instinct for games and his swiftness of foot and high spirit made him an excellent football player; but he played football, as he did everything else, with an eagerness which overstrained his delicate nervous system, and in consequence he suffered from illness and sleepless nights. Here too he enlarged his reading in history and surprised his tutors by the force and originality of his essays. He began to feel an impulse towards purely intellectual pursuits and an unfitness for the career of a soldier. His father was no longer living, and, at his own request, he left the college when he was about sixteen years of age. He had not made many friends among his fellow students, but he had impressed the masters as a youth of singular talent and singular elevation of character; so much so, that one of them, making him a present on his departure, asked him to accept it as a token "of real respect and esteem."

Having abandoned all thoughts of entering the army, Toynbee next thought of preparing himself to enter the Civil Service; and with this view spent the two following years in reading at home and in attending lectures at King's College, London. Subsequently he resolved to be called to the Bar; a resolution which he only abandoned after a painful struggle and in obedience to circumstances. These were to him years of painful uncertainty. Although he had many who were very dear to him, none fully understood, certainly he did not himself understand the tendency of that inward restlessness which he seems to have experienced at this period. It is the fashion to say that youth is the happiest season of life, and, in one sense, this is true, but in another sense it is equally true, that the youth of thoughtful persons is often racked with pains which they cannot express and which are



not the less real, because their elders can prescribe nothing better than platitudes. The sufferings of middle and of latter life bear no more analogy to these pains than does the anguish of a toothache to the torture of cutting one's teeth. Whilst the surface-current of Toynbee's mind set now towards this, now towards that profession, the undercurrent set more and more steadily towards the pursuit of truth. At length that current swept him right away and he deliberately resolved to devote his life to the study of history and of the philosophy of history. In order to secure quiet for his meditations, Toynbee took lodgings, first, in the village of Bracknell in Berks, and afterwards in the village of East Lulworth on the Dorsetshire coast; in these retreats he spent many months. For the first time he began to see what he really wished to do, and, still more important, what it was that he really could do.

Toynbee's aspirations and plans of study of this period may best be gathered from a letter which he wrote to the late Mr. Hinton, a warm friend of his father and a spirit in many ways congenial to his own. It will be necessary to refer hereafter to the correspondence in which this letter occurs. It is dated the 18th of September, 1871, when the writer had just completed his nineteenth year and was written from East Lulworth. The passage relevant in this context is as follows:—

“For myself, I have, since the beginning of April, with the exception of a short interval in July, been reading alone at this quiet little village near the seacoast, ostensibly with a view to a University career; but determined to devote my life and such power as I possess to the study of the philosophy of history. With this object in view, I have no inclination to enter any profession; nor do I think it probable that I shall compete for a scholarship at the University. To these pursuits I wish to give my whole life. The small means at my disposal, and those which without the expenditure of much time I hope to be able to add to them, will be sufficient for

my maintenance. I do not care to spend my life in acquiring material benefits which might have an evil, and at any rate could not have a good effect upon me. These ideas may appear ridiculous in one so young and of powers so immature, but they are not the result of mere ambition, or of an empty desire for fame in itself, or for the rewards with which it is accompanied. My sole, and so far as it can be so, unalloyed motive is the pursuit of truth ; and for truth I feel I would willingly sacrifice prospects of the most dazzling renown. I do not even think myself capable of accomplishing any work of importance. If my labors merely serve to assist another in the great cause, I shall be satisfied."

As time went on Toynbee found reason to vary the programme of work laid down in this letter, but he never swerved from the spirit expressed therein. Few men have combined so much self-confidence with so much modesty, or have been so entirely absorbed in their work, so totally free from motives of vanity or of egotism. Yet a solitary life was neither natural nor wholesome for one so young. At this time he was an absolute recluse in his habits, and even when at home shut himself up with his books, disdaining, like so many clever boys, to mix with ordinary society. Happily, this stage of his life was not to continue much longer. When he had reached the age of twenty-one years, he found himself master of a small capital, and trusting to this for maintenance during a university career, he became a member of Pembroke College, Oxford, in the January of 1873. In the autumn of that year he resolved to compete for a scholarship in Modern History at Balliol College. Here he was unsuccessful. He had brought up to the University a considerable knowledge of history and of general literature. But he had accumulated knowledge in order to satisfy his own cravings, not the curiosity of examiners. He had accumulated it without advice or assistance, and had never gone through that singular process whereby a lad who knows little and cares nothing for knowledge is enabled to turn out dozens of tolerably correct essays

upon dozens of great subjects. In short, he had not read for examination, and, when examined, could not do himself justice.

From this repulse, however, Toynbee derived a benefit impossible to estimate too highly. As he had read and reflected by himself, and had honestly worked out his own opinions, he imagined himself to have gone deeper and further than was really the case. Extreme, therefore, was his disgust when one of his examiners, in explaining to him the reasons of his ill-success, said: "You have picked up your ideas from hearing the clever talk of London society, and you have written your papers just as you would talk." He used afterwards to say that this criticism, baseless as it was, had done him the greatest good imaginable. It is true that the incisive way of putting ideas which struck his examiners derived itself from an incisive way of thinking, and continued with him throughout life. But it is also true that, in the present stage of learning, the student who does not avail himself of the recognized methods is like a traveller who prefers his own legs to an express train. With all their faults, the universities supply to the scholar that which he cannot dispense with and cannot get so well anywhere else—the methods elaborated by thousands of his predecessors; the correction supplied by contemporaries equal or superior to himself; the powerful current of spiritual electricity set up in the assemblage of so many eager wits. Had Toynbee never gone to the University, he might have remained all his life groping towards results long since attained by men far inferior in force of character and of intelligence. His new experience taught him his defects and how to amend them.

But the immediate result of the scholarship examination was one of those tedious illnesses which consumed so much of the short time allotted to him upon earth. He was forced to leave Oxford, to suspend all his work, to go down into the country and try slowly and painfully to rally his exhausted powers. From this and many other such intervals of mourn-



ful leisure he, indeed, drew profit, as such a nature draws profit from every experience. For his friends they were an unmixed sadness. It was not until a year had passed away that he was able to return to Oxford. In the January of 1875 he became a commoner of Balliol College. His real undergraduate life commences from this date; and here the narrative of his early years may best conclude.

## II.

Toynbee's health continued to be so delicate that he could not read for honors in any school, much less compete for any university prizes or distinctions. As he was unable to study hard for more than an average of two or three hours a day, he was obliged to content himself with a pass degree. Yet few men have derived more profit from a university course. He continued to read widely and judiciously. The Master and the tutors of Balliol College fully comprehended his great gifts and great embarrassments, and gave him sympathy, guidance and frank, discerning criticism. He always gratefully acknowledged much he owed especially to the Master and to the late Professor Thomas Hill Green. As regards his merely academic studies, it is here enough to say that he took a pass degree in the summer of 1878.

Every one who knows Oxford will allow that, valuable as is the teaching supplied by the university and the colleges, it is hardly more valuable than the genial intercourse between the young inquisitive spirits there assembled.

Although Toynbee had hitherto lived in seclusion, he fell very readily into this intercourse and gave even more good than he received. He was in truth formed for society and friendship. At this time he was very comely and attractive in appearance. An oval face, a high forehead crowned with masses of soft brown hair, features very clearly cut, a straight nose and a rather large, full-lipped mouth, only needed more color to produce the impression of beauty; and even the color

wanting to his gray eyes and brown complexion was supplied when he grew warm in conversation by a lighting up of his whole countenance, a brilliant yet soft irradiation, which charmed the beholder and can never be forgotten by those who knew him well. Together with this winning countenance he had a manner singularly frank, open and animated. A student and an invalid, he was free from the vexatious oddities of either; was neither shy nor slow nor abstracted nor languid, but always prompt and lively. He talked extremely well, without exactly conversing. For that delightful pastime which the French call a *causerie* he was not altogether adapted. For that the mind must be habitually at ease—not unemployed, but never taxed up to its utmost strength, not strained by crowding ideas on vehement feelings. Toynbee, as time went on, came to concentrate more and more upon a few momentous subjects which were ever present to him, concerning which he spoke with wonderful eloquence and enthusiasm. The faces of listeners supplied him with the stimulus which his sensitive temperament and weak body required. He never was quite happy in writing out his thoughts. He complained that they came upon his mind faster than he could set them down on paper. That he had real literary talent, many passages in the volume of fragments published after his death show; but nothing which he has written gives any idea of his power of expressing himself by word of mouth. Although he spoke rapidly and copiously, he never was betrayed into a vulgar phrase or slovenly construction; he spoke as one to whom idiomatic utterance is natural, correctly and forcibly, without the cant phrases of the undergraduate or the studied negligence of the college tutor. Nor did he, like so many other exuberant speakers, suggest to those who heard him that he spoke out of a passion for display. If he talked much it was because he forgot himself in his subject. No man ever was more willing to hear all that others had to say, or sought with more kind and courteous attention to encourage criticism, even opposition. Naturally combative and fond of controversy, he

was never betrayed into those little breaches of amenity so common even among men of good temper and good breeding when heated by argument. Naturally somewhat intolerant, he had schooled himself into genuine tolerance. Naturally sensitive and excitable, he had, whilst retaining all his original warmth, subdued in a surprising degree the impulse to exaggerate. Everything he said bore the impress of an exquisitely fine nature. One could not listen to him without admiring, or argue against him without loving. One could no more say a brutal or profane thing to him than to the most delicate lady. Not that he was finical, or censorious, or assumed the right to check others in an impertinent or condescending tone, but that no man of good feeling could, without a cutting pang of remorse, shock such an exquisite sensibility.

Good looks, talent, information and social gifts are more than enough to gain friends at the University; but Toynbee had many other attractions. He was in all senses of the word, sympathetic. He had sympathy for men's sufferings, for their interests and pursuits, even for their failings and misdeeds. No matter what the troubles of an acquaintance—ill health, ill success, disappointment or poverty, they always seemed to raise his value in Toynbee's eyes. Nor was compassion with Toynbee a mere sentiment. He was always eager to assist in any useful way, studied his friend's affairs as if they were his own, gave the warmest, sincerest encouragement to the desponding, the kindest, tenderest criticism to the erring, yet seemed never to expect any thanks and to take gratitude as a free gift. Out of his small store of life and strength he bestowed freely upon all. With this evangelical charity he joined the widest sympathy of another kind. All fellow students were his brethren. Their labors, their acquisitions, their successes were his. He admired talent of all sorts, and rejoiced in all achievements which enriched the life of the individual or of the race.

For a man of this temperament the years spent at college are his happiest. The years that come after may bring the



philosophic mind ; but they cannot add the joy and the fulness of life. Toynbee had not hitherto felt how much he was alive ; he felt it now, and was charmed with a new sense of expansion. "The garden quadrangle at Balliol," he writes to a friend, "is where one walks at night, and listens to the wind in the trees, and weaves the stars into the web of one's thoughts ; where one gazes from the pale inhuman moon to the ruddy light of the windows, and hears broken notes of music and laughter and the complaining murmur of the railroad in the distance. . . . The life here is very sweet and full of joy ; at Oxford, after all, one's ideal of happy life is nearer being realized than anywhere else—I mean the ideal of gentle, equable, intellectual intercourse, with something of a prophetic glow about it, glancing brightly into the future, yet always embalming itself in the memory as a resting-place for the soul in a future that may be dark and troubled after all, with little in it but disastrous failure."

Soon after Arnold Toynbee came up to Oxford, Mr. Ruskin, then Professor of Fine Arts in the University, made a characteristic endeavor to illustrate the dignity and good effects of even the coarsest bodily toil. He persuaded many undergraduates to work under him at the repair of a road in the village of Hinksey near Oxford. Among these undergraduates was Toynbee, who rose by his zeal to the rank of a foreman. He was thus entitled to appear frequently at those breakfasts which Mr. Ruskin gave to his young friends and enlivened with quaint, eloquent conversation. Upon men like Toynbee, intercourse with Mr. Ruskin had a stimulating effect more durable than the actual improvement of the road near Hinksey. Toynbee came to think very differently from Mr. Ruskin upon many subjects, and especially upon democracy ; but always regarded him with reverence and affection. About the same time Toynbee joined the Oxford University Rifles, because he thought that every man should qualify himself to take part in the defence of his country ; he was unable, however, long to fulfil the duties of a volunteer.

His bodily weakness, which also forbade him to study long or with strict regularity, constrained him, as it were, to enjoy Oxford and its society more than he might otherwise have allowed himself to do. It brought another indirect advantage of even more consequence. It saved him from the bad effects of our fashionable method of intellectual instruction, which tends to make the student read as much and as widely as possible without any reference to the effect which reading may have upon the mind. Toynbee was naturally exact in his intelligence, and gained in accuracy and thoroughness as time went on. He derived nothing but good from his studies as an undergraduate. Older than most undergraduates, he felt the genial influence of Oxford, without being overpowered by it. Without ceasing to be original he appropriated, more freely than he had ever done before, the ideas of his time. Soon after coming into residence at Balliol College, he had decided to take political economy for his province and to study it upon historical methods. Political economy attracted him chiefly as affording instruction respecting the conditions of social life, and his interest in that science was singularly intertwined with interest in other subjects, in popular prejudice the most remote from it of any.

Religion daily came to occupy his thoughts more and more. In his boyhood it had no very important place. He had received the usual instruction in religious subjects and this had, as usual, made very little impression. His father, although, full of religious feeling, had perhaps wisely abstained from indoctrinating his children with any rigid creed or drilling them in any strict forms of worship. When Arnold Toynbee had reached the age at which life first becomes serious, his first aspirations were, as we have seen, purely intellectual. He wished to live for others and resolved to live for them as a student. An increase of knowledge was the blessing which he wished to confer upon his race. But his early ideal was not to give him full satisfaction. Even at the age of nineteen years, as is shown by the correspondence with Mr. Hinton

above quoted, he had begun to ponder the most vexing problems which offer themselves to the devout mind. The correspondence turned chiefly upon Mr. Hinton's book "The Mystery of Pain." Mr. Hinton's speculative enthusiasm, his real elevation of mind and sympathy with religious cravings were such as might well fascinate an eager clever lad arrived at the age when the very few who are not absorbed in careless gaiety are so frequently devoured by ascetic earnestness. As time went on the spell which Mr. Hinton exercised over Arnold Toynbee lost much of its force. The young man came to see that Mr. Hinton's remarkable book leaves the mystery as mysterious as it was before, and felt perhaps a growing sense of discord between his own nature and that of his early teacher. Their exchange of ideas nevertheless marked an epoch in Toynbee's life.

His religious development was not checked but accelerated by his residence at Oxford. "Most men," he said, "seem to throw off their beliefs as they pass through a University career; I made mine." Just before becoming an undergraduate he had, of his own accord, turned to the classics of religion and read them with the eagerness of one who is quenching a real and painful thirst. He read the Bible so earnestly as to draw from one of his friends the deliciously naïve remark "Toynbee reads his Bible like any other book—as if he liked it." In the course of his first year at Balliol he writes to a friend: "The two things the Bible speaks to our hearts most unmistakably are the unfathomable longing for God, and the forgiveness of sins; and these are the utterances that fill up an aching void in my secular religion—a religion which is slowly breaking to pieces under me. It is astonishing to think that in the Bible itself we find the most eloquent heart-rending expression of that doubt and utter darkness and disbelief which noisy rhetoricians and calm sceptics would almost persuade us were never before adequately expressed—they would tell us we must look for it all in their bald language." And a little later, "A speechless thrill of spiritual



desire sometimes runs through me and makes me hope even when most weary." "As to position in life," he wrote about the same time, "the position I wish to attain to is that of a man consumed with the thirst after righteousness."

As Toynbee's religion had not come to him through the medium of customary religious forms, or in association with accepted religious dogmas, these dogmas and forms never were to him so momentous as they are to many devout souls. Not indeed that he was hostile to either. He knew that the practice of simple religious observances was beneficial to the spiritual life of the individual and necessary to the spiritual life of the nation; he joined in them and, as time went on, valued them more highly than he had done in youth. He would earnestly seek out the truth contained in accepted dogmas; but he could not help seeing how mischievous to religion and to civilization some of them have proved, and how inadequate all must necessarily be. His incisive intelligence and historical feeling forbade him to dress his faith in the worn out garb of mediæval devotion, or to try the spiritual discipline of believing what he knew to be untrue. Yet the same intelligence and feeling forbade him to set up an infinitesimal church of his own or to worship assiduously an ideal existing only in his own imagination. He thought that any follower of Christ might live in the Church of England. He always strove to find some definite intellectual conceptions to support his faith, for he saw that without such conceptions piety must degenerate into sentiment. It seemed to him that, whilst every age and country, nay every serious believer, must more or less differ in religious doctrine from every other, since religious doctrine is related to the whole spiritual, moral and intellectual life, which is infinitely various, yet doctrine of some kind or another is necessary in every instance, and peace and freedom are to be found, not in luxurious dreamy fiction, but in the humble acknowledgment that the best and highest utterances of man concerning God are inevitably imperfect, incoherent and transitory. Thus eagerly searching to har-

monize the piety which he had learned from the Bible, and the Imitation of Thomas à Kempis, with those modern ideas to which he was equally loyal, he found especial help in the teaching and conversation of the late Professor Green, whose lay sermons delivered in Balliol College made a memorable impression upon many who heard them. Professor Green united the critical temper of a German philosopher with the fervor of a Puritan saint. Between him and Toynbee there was an entire confidence and an intimate intellectual and spiritual communion which only death interrupted.

It would not be right here to set out a body of doctrine with Toynbee's name attached to it. He was ever feeling his way, serving after truth, without arrogance, but with the honest resolution not to accept propositions merely because they flattered his higher sentiments. His nearest friends caught from his conversation, and still more from his daily life, a bright reflection of his inward fire; but none probably would venture to catalogue his beliefs. It will be better to try to gather from his own words what he really thought, always remembering that he was very young and oppressed by the immensity of religious conceptions. The following passage occurs in a letter written to an old schoolfellow who had become an officer and was then serving in the Indian Army. The letter is dated the 2nd of October, 1875, the first year of his residence at Balliol College:

“‘To love God’—those words gather amazing force as life gets more difficult, mysterious and unfathomable; one's soul in its loneliness at last finds religion the only clue. And yet how weary is the search for God among the superstitions, antiquities, contradictions and grossness of popular religion; but gleams of divinity are everywhere, and slowly in the end comes divine peace. . . . It seems to me that the primary element of all religion is the faith that the end for which the whole universe of sense and thought from the Milky Way to the lowest form of animal life, the end for which everything came into existence, is that the dim idea of perfect holiness

which is found in the mind of man might be realized ; that this idea is God Eternal and the only reality ; that the relation between this idea which is God and each individual is religion, the consciousness of the relation creating the duty of perfect purity of inner life or being, and the duty of living for others, that they too may be perfectly pure in thought and action ; and, lastly, that the world is so ordered that the triumph of righteousness is not impossible through the efforts of the individual will in relation to eternal existence. I speak of God as an idea and not as personal ; I think you will understand what I mean if you ask yourself if the pure love and thoughts of a man are not all that makes his personality clear to you—whether you would care that anything else of him should be immortal ; whether you do not think of all else of him as the mere expression and symbol of his eternal, invisible existence. My dear fellow, don't think it strange that I send you these bare, abstract thoughts all those dizzy leagues to India. I only want to tell you what I am thinking of ; do not take heed of them except in so far as they chime harmoniously with your own belief ; I think they are the truth, but truth comes to every mind so differently that very few can find the longed-for unity except in love."

From the passage just quoted the reader might draw an inference which it does not justify. Toynbee was perfectly well aware that a Divinity who is nothing more than an abstraction has never been and never can be the object of a real, living religion. Concerning the creed of the Positivists, whose virtues he honored, he wrote some years later. "Humanity is really an abstraction manufactured by the intellect ; it can never be an object of religion, for religion in every form demands something that lives and is not made. It is the vision of a living thing that makes the Psalmist cry 'As the hart panteth after the water-brooks, so longeth my soul after thee, the living God.'" The following words quoted from an address upon the ideal relations of Church and State, may remove some doubts as to his own position :



"God is a person—how else could man love and worship God? What personality is, we only faintly apprehend—who has withdrawn the impenetrable veil which hides our own personality from us? God is a father—but who has explained a father's love? There is limitation to man's knowledge, and he is disposed to cry out, Why this impassable barrier? He knows he is limited—why he is limited he knows not. Only by some image does he strive to approach the mystery. The sea, he may say, had no voice until it ceased to be supreme on the globe. There, where its dominion ended and its limits began, on the edge of the land, it broke silence. Man would have had no tongue had he been merely infinite. Where he feels his limits, where the infinite spirit within him touches the shore of his finite life, there he, too, breaks silence."

On the other hand, all notions of a special Providence favoring this or that race, this or that individual, were shocking to Toynbee's moral and religious feelings. Nothing scandalized him more than the self-congratulation so often uttered by serious people on the occasion of their escape from the plagues and miseries which visit others. Miracles do not seem to have been felt by him as aids to the belief in God. The strangest of these supposed irregularities appeared to him less divine than the order and harmony of the universe. He might have chosen to express his feeling of the presence of God in the words of one of his favorite poets :

"A sense

Of something, far more deeply interfused,  
Whose dwelling is the light of setting suns,  
And the round ocean, and the living air,  
And the blue sky, and in the mind of man  
A motion and a spirit that impels  
All thinking things, all objects of all thought,  
And rolls through all things."

Not that his creed was pantheism, if by pantheism we mean merely a vague awe or admiration inspired by the mighty sum of existence. To him, as we have seen, God was a spirit, a

person in the fullest sense of the word. For him religion was inseparably bound up with conduct and with righteousness. "If I did not believe that the moral law was eternal," he once said, "I should die." But he felt irresistibly impelled to struggle out of the dualism which contents the multitude.

From weakness of imagination most religious people regard the visible world as something external to God, and related to Him only as a picture is related to the painter or as a kingdom is related to its sovereign. They find something reassuring and comforting in direct exertions of the Divine prerogative. As the inexplicable is for them the sacred, every expansion of their knowledge is a contraction of their faith. Most touching it is to hear them say, Ah! there are many things for which the men of science cannot account, many things which show that there must be a God. Most strange is their reluctant conviction that, in so far as the universe can be shown to be rational, it is proved to have no soul. Their frame of mind was quite impossible to Toynbee, who believed in science as he believed in God. He saw that the so-called conflict of religion and science really grows out of two intellectual infirmities common—the one among the devout multitude, the other among students of particular physical sciences. On the one hand, religious experiences have been almost inseparably associated in the popular mind with the belief in certain historical statements, which, whether true or false, must be tried by the critical canons applicable to all statements of that kind. On the other hand, absorption in the pursuit of physical science often leads men to forget that such science can give no ultimate explanation of anything, because it always postulates certain conceptions which it does not criticise. For facts of geology or biology we must always have recourse to geologists or to biologists, not because they know everything but because they alone can know anything relating to these sciences. On the other hand, neither the geologist nor the biologist, as such, can give the ultimate interpretation to be put upon all facts whatsoever. Free from

these contending prejudices, Toynbee always felt sure that the progress of criticism must end, not in destroying religion, but in purifying religion from all that is not essential. Of the great Christian ideas he wrote: "They are not the creations of a particular hour and place, they are universal, but they became a compelling power owing to the inspiration of one teacher in a particular corner of the earth. What the real character of Christ was, what is the truth about certain incidents of his life, we may never ascertain, but the ideal Christ, the creation of centuries of Christian suffering and devotion, will be as little affected by historical scepticism as the character of Shakespeare's Hamlet by researches into the Danish chronicles. Prove to-morrow that the Scripture records and the Christian tradition are inventions and you would no more destroy their influence as a delineation of the spiritual life than the critics destroyed the spell of the Homeric poems by proving that Hector and Achilles never fought on the plains of Troy. This may seem a paradox, but the time will come when we shall no more think it necessary to agree with those who assert that Christianity must stand or fall with the resurrection of Christ than we now dream of saying with St. Bernard that it must stand or fall with belief in the Virgin Mary. The Christian records and the lives of the saints will be indispensable instruments for the cleansing of the spiritual vision, and the power which they exercise will be increased as their true value as evidence is understood. The Christian religion itself will in future rest upon a correct interpretation of man's spiritual character."

Toynbee was well aware of the spiritual languor which has been among the immediate results of the extraordinary growth of physical science in our own age. He had none the less a steadfast assurance that religion must in the end gain strength from the increase of knowledge. The following passage from an unpublished essay shows with what confidence he awaited the issue of that revolution in thought which has terrified so many good people:—



"Most terrible is the effect of the Reign of Law on the belief in immortality. Fever and despair come upon action, and the assertion that this world is all in all, narrows and perverts the world of ethical science. And, indeed, it is very awful, that great contrast of the Divine Fate of the world pacing on resistless and merciless, and our passionate individuality with its hopes and loves, and fears; that vision of our warm throbbing personal life quenched for ever in the stern sweep of Time. But it is but a passing picture of the mind; soon the great thought dawns upon the soul, 'It is I, this living, feeling man, that thinks of fate and oblivion; I cannot reach the stars with my hands, but I pierce beyond them with my thoughts, and if things go on in the illimitable depth of the skies which would shrivel up the imagination like a dead leaf, I am greater than they, for I ask "why" and look before and after, and draw all things into the tumult of my personal life—the stars in their courses, and the whole past and future of the universe, all things as they move in their eternal paths, even as the tiniest pool reflects the sun and the everlasting hills.'

"Like all great intellectual revolutions, the effect of the Reign of Law upon ethical temper has been harassing and disturbing; but as every great intellectual movement has in the end raised and ennobled the moral character of man through the purification of his beliefs, so will this great conception leave us the belief in God and the belief in immortality purified and elevated, strengthening through them the spirit of unselfishness which it is already beginning to intensify, and which makes us turn our faces to the future with an ever-growing hope."

Religion was the inspiring force of Toynbee's later years and his efforts to understand and contribute to the cure of social evils were prompted above all by the hope of raising the people to that degree of civilization in which a pure and rational religion would be possible to them. Sensitive to their physical sufferings he was in a degree which at times

almost overpowered his judgment; but he never imagined that the franchise, regular employment at fair wages and cheap necessities were in themselves capable of appeasing the tremendous cravings of human nature, of quieting the animal appetites or of satisfying the nobler aspirations. He did perceive, however, that a great number of our people live in such a manner as to make materialism and fanaticism almost unavoidable alternatives for them. Having found religion for himself and being eager to help others to find it he did not immediately become a missionary. He would speak frankly of religion to those who appeared to him really concerned about it; and he hoped that at some future time he might find a way of preaching to the people. But it was not in his nature to be loquacious about spiritual matters and he was fond of quoting Bacon's saying: "The greatest of theists are the hypocrites; for they handle sacred things without feeling them."

Toynbee's desire to understand and help the poor led him to spend part of the vacations of 1875 in Whitechapel. Already he had arrived at the conclusion that mere pecuniary assistance unaccompanied by knowledge and sympathy is not enough to bring about any lasting change for the better in their condition. But such knowledge and sympathy, he saw, can only grow out of long and familiar intercourse, in which both parties meet as nearly on an equality as the facts of the case will allow. Acting upon these beliefs he took rooms in a common lodging house in the Commercial Road, Whitechapel, and furnished them in the barest possible manner. He cordially enlisted himself in the endeavors made by the good people there to assist their neighbors. He always was well aware of the value of existing organizations, of the fact that the worst use which can be made of an institution is to destroy it. He would have endorsed that fine saying of Burke: "Wisdom cannot create materials; her pride is in their use." He put himself at the disposal of the Reverend Mr. Barnett, the Vicar of St. Jude's, and entered with zest

into all the little feasts and amusements of the school children and their teachers. He also worked under the Charity Organization Society, and particularly valued this employment as giving an incomparable insight into the real condition of those who are so much talked about and so little known. He also joined the Tower Hamlets Radical Club and spent many an evening there, trying to appreciate the ideas of East End politicians. Finding that many members of the club entertained especially strong prejudices upon the subjects of religion and of political economy, he chose these for his subjects when asked to address the club. In giving the address upon religion he discovered in himself a new power. Although he had not had any previous experience and had not elaborated his discourse beforehand, he spoke eagerly, clearly and continuously for nearly three-quarters of an hour and succeeded in fixing the attention of his hearers. He was thus led to the conclusion that speaking rather than writing would be the best medium for his ideas, and resolved to repeat the experiment as often as time and strength would allow. In substance, this address was an attempt to express, freed from accretions, the essence of religion, the thoughts and feelings common to the saints of all creeds and of all ages. When he sat down there followed a debate, more lively than orthodox in tone. One orator in particular derided the common conception of heaven as a place where the angels have nothing to do but to let their hair go on growing and growing for ever. His indefatigable industry, the noisy situation of his lodgings, the extreme dullness and dreariness of the east end of London, and, most of all, the constant spectacle of so much evil, so difficult, I will not say of cure, but of mitigation, made residence in Whitechapel too exhausting for Toynbee's delicate constitution. He never found fault with anything, and stuck to his post as long as he could. But he was at length forced to give up his experiment. Although he was never able to repeat it, it confirmed him in the belief that the prosperous must know before they can really assist the



poor; and he was fond of insisting that thought and knowledge must now in philanthropy take the place of feeling. His example and teaching in this matter have resulted in the foundation of Toynbee Hall in Whitechapel, the inmates of which are enabled, without forsaking their own friends or pursuits, to live among those whom they wish to benefit.

Whilst thus busied with many things, Toynbee contrived to find delicious intervals of rest. He was a keen lover of the country. His naturally high spirits became almost boisterous in its pure air. Once or twice every year he escaped to some charming place, where with one or two friends and a few favorite books he revelled in pleasures that needed not to borrow from luxury. He preferred to all other beautiful districts that of the Lakes, endeared to him by memories of rambles enjoyed there in boyhood and by association with Wordsworth's poems. He was peculiarly sensitive to all charms of association. Beauty was to him rather suggestive than satisfying. He looked out upon the world with the eyes of a philosopher rather than that of an artist. In the National Gallery, one of his favorite haunts, he was fascinated less by revelations of perfect form and color than by the austere grace and pathos of such a painter as Francia. He was especially fascinated by the face of one of the angels in Francia's picture of the Entombment. "Shall I tell you to what I liken it?" he writes in a letter. "Have you on a still summer evening ever heard far-off happy human voices, and yet felt them to be sad because far-off? In this angel's face there is that happy tone, but so distant that you feel it is also sad. Have you ever, when the raindrops are pattering softly on the leaves, heard the sweet, low song of birds? In that angel's face are joy and sadness thus mingled." His travels in Italy in the year 1877 were to him full of interest and enjoyment; but Italy does not seem to have become dear to him; her art and her climate were perhaps felt by him as oppressively splendid; her sunny magnificence was not congenial to a temperament in its depths so full of seriousness.

He was a very accurate observer of outward things, and in his letters or conversation would reproduce with a fine touch the features of a remarkable landscape. He had learnt much from Mr. Ruskin's extraordinary descriptions of nature, but both by reading and by experiments of his own, had become convinced that the pictorial powers of language are narrowly limited. He saw that the mania for word-painting has for the most part resulted in verbosity, confusion and weakness. Writing to a friend, he observes :

“The best pieces of description are little bits of incidental observation. The worst are those interminable pages of mere word-daubing, which even Ruskin is not guiltless of. When you look for topographical accuracy, you are utterly disappointed. Since my interest in surface geology and physical geography has been sharpened by the study of political economy, I have looked out for plain facts in these fine rhapsodies, and have found them as useless as the purple mountains and luxuriant foregrounds of a conventional landscape. The fact is, a man must do one of two things. Either give a strict topographical account of a place, noting down relative heights and distances, conformation of the rocks, character of the vegetation, in such a way that you can piece the details together into an accurate outline ; or he must generalize his description, carefully eliminating all local details and retaining only the general effect of the scene on his mind at the time. The greatest poets do the last ; if you turn to the *Allegro* and *Penseroso* of Milton, you will be struck by the vividness of every touch and the absence of any attempt to picture an actual scene. In most modern descriptions there is a mixture of both kinds. You will find plenty of vague, often exaggerated expressions, confused by little pieces of irrelevant local detail which tease the imagination ; they tell you a rose tree grew on the right side of the door, yet never give the slightest chance of placing yourself in the scene.”

Unlike most travellers who, if they care for anything, care only for the picturesque, Toynbee was insatiable of informa-

tion respecting the condition and way of thinking of the people amongst whom he travelled. So frank and cordial was he in his conversation with all sorts of men that all readily opened their minds to him. It is true that they took pains to show him as little as they could of their meanness or triviality, and it is probable that he, quick and eager as he was, sometimes read into their words thoughts which were not clearly there. Yet from this personal intercourse Toynbee derived knowledge which he could not have so well acquired in any other way. Young as he was, and almost overpowered by his feelings of benevolence and sympathy, he yet knew a great deal concerning the classes for whom he labored. In this respect he differed much from many good men of our own generation.

Indeed, notwithstanding his warm and enthusiastic devotion to the ideal and his indifference to the honors and rewards so highly valued by most of us, Arnold Toynbee had a great deal of common sense. He understood that if we cannot live by bread alone, neither can we subsist solely on nectar and ambrosia. One example of the prudence which he exercised, at least in counselling others if not always for himself, may be quoted here. A younger brother, having gone into business in the City, was oppressed with a growing distaste for his work and for his companions. He began to think seriously of choosing another walk in life, and took counsel with Arnold. Arnold, in reply, wrote as follows :

“I am very sorry you are so disappointed with your work. What you say about the habits and tastes of business men is, no doubt, true ; but don't imagine that other classes are very different. If you came here and went to a small college, you would find that the tastes and habits of the majority of undergraduates were much the same as the tastes and habits of clerks in the City. I say a small college, because in large colleges, where you have greater numbers to choose from, you would find a certain number like yourself, who care for refine-

ment and dislike coarseness: but you would have to pick them out. Remember, refinement is not common. In no occupation which you wished to adopt would you find the ways and opinions of your fellows, or most of them, those which you have been brought up to seek and approve. Don't misunderstand me. All I mean to say is, human nature in the City is much like human nature in the University. The passions of men who cast up accounts and buy and sell tea are not very unlike the passions of men who study Plato and struggle for University distinctions. Whatever work you undertake, you must expect to have to do with coarse men who pursue low aims. You will, perhaps, answer: 'But in this case there is literally not a single person I care for or can make my friend. In another occupation there would, at least, be one or two men I could like.'

"Granting this, let me advise you on one point—don't think of throwing up your present work, until you see quite clearly what other work there is you can do which will suit you better and enable you to make a livelihood. Look about, make enquiries, but don't allow yourself to change until you have fixed on some new line and fixed it after fullest consideration of all you will have to face.

"People who have no decided bent for any one thing, naturally think that whatever they undertake is not the work they are best fitted for; this is true of a great many people. If you can point to anything you would like to do better than anything else—I should say, do it at once, if you can get a livelihood by it. As it is, I say, wait, be patient, make the best of your work, and be glad you have the refinement you miss in other people.

"There—I hope you don't think I am harsh. I know your position is difficult, is unpleasant—but I don't see how it can be altered yet, and therefore I advise you to do what I am sure you can do—make the best of it.

"Ever your loving brother,

"A. TOYNBEE."



The author of this wise and sententious letter had said in one written some time before, "As a rule we find our friends and counsellors anywhere but in our own family." The saying, although a hard one, is true; and the explanation given is ingenious. "We are so near and so alike in many things, we brothers and sisters, that in certain details we have a more intimate knowledge of each other's characters than our dearest friends. We know the secret of every little harsh accent or selfish gesture; words that seem harmless to others are to us full of painful meaning because we know too well in ourselves the innermost folds of the faults they express. There is nothing we hate more than our own faults in others; that is the reason why so many brothers are in perpetual feud, why so many sisters are nothing to each other, why whole families live estranged. And yet it is equally obvious that a chance acquaintance often judges us more fairly than our own nearest relations, because these details worked into prominence by the trying friction of everyday life, are after all only a very small part of us which our relations rarely see in perspective. That is the reason. Though near in some ways, we are never far enough off. We never see each other's characters in proportion, as wholes."

### III.

Having taken his degree, Toynbee had next to consider how he should secure a livelihood. He had come up to Oxford without definite prospects and during his stay there had become more and more unwilling to adopt any of the ordinary professions. He had not gained those distinctions or accumulated that sort of knowledge which may be said to ensure election to a fellowship. He had, however, impressed the authorities of Balliol College with his rare gifts of talent and character; and by them he was appointed tutor to the students at that college who were qualifying themselves for the Indian Civil Service. The performance of the duties

attached to his post left him a good deal of leisure in which to prosecute his favorite studies. The stipend was not large, but he was a man of few wants and always held simplicity of life to be a sacred duty. He was not without desires, but they were impersonal, and besides were under the control of a strong will. Always delicate and often suffering from severe illness, he had never acquired the habit of petting himself. He had retained all the manliness which we usually fancy inseparable from robust health. Yet, whilst thus severe towards himself, he was indulgent to others, generous, spirited and quite free from those boorish or cynical oddities which have so often deformed the appearance and conversation of men distinguished by unworldliness. In his countenance, in his words, in his tastes, in his actions, there was a distinction and an elegance which preserved his simplicity from plainness. There was something in his presence which checked impertinence and frightened vulgarity.

Had Arnold Toynbee lived in the thirteenth century, he would probably have entered or founded a religious order, unless he had been first burnt for a heretic. In the nineteenth century, he lived to show how much may be done, way, how much may be enjoyed by a man whom society would think poor. When about to address audiences of workingmen, mostly artisans and mechanics, he used to say that he liked to think he was not himself much richer than they were. True, there was just the least touch of exaggeration in his scorn of superfluities. His ideas respecting the income sufficient for keeping a house and rearing a family sometimes forced a smile from those more versed in the sordid struggles of the world and in the sad defacement of human nature which those struggles cause. These ideas, however, influenced his political creed. He always believed in the possibility of a democratic society, whose members should be intellectual, refined, nay spiritual; and, believing in this possibility, he joyfully hailed the spread of democratic institutions. Perhaps he did not fully realize the enormous cost and

trouble required in most instances for the full development of human faculties. Perhaps he did not quite understand how deep-rooted in the necessity of things is the frantic eagerness of all men of all classes and parties to seize the means of life and expansion. Carlyle's comparison of mankind to a pot of tamed Egyptian vipers, each trying to get its head above the others, was foreign to his way of thinking. Men's generous instincts and high aspirations he shared and therefore understood; but their imperious appetites and sluggish consciences he had only studied from without; he had not learnt by communing with his own soul. Like Milton, Shelley or Mazzini, totally dissociated from the vulgar wants of the upper, the lower or any other class, he was a democrat, because he contemned the riches and honors of this world, not because he was anxious to secure for himself as much thereof as fell to the lot of any other man.

In June of the year 1879 Toynbee married a lady who had for several years been his close friend. She survives to mourn an irreparable loss, and it would not be fitting to say of their married life more than this that it was singularly happy and beautiful. During the few months immediately following upon his marriage Toynbee seemed to regain much of the health and elasticity proper to his time of life. The pleasure of finding himself understood by the person whom of all others he most valued and the calming influence of a regular occupation had a most wholesome effect upon his highly strung and over-taxed nerves. His constitution seemed to recruit itself daily in the genial atmosphere of a home. His spirits became higher and more equable than they had been for many years. His thoughts grew clearer and clearer to him. It seemed, alas! it only seemed that he was about to rise out of the pain and weakness of youth, and to enter upon a long career of beneficent industry. Too soon this fair prospect was clouded. He plunged with redoubled ardor into endless and multifarious labors. He found so much to do, he was so eager to do it all, that he would never seek rest and so at

length rest would not come to him. He felt his intellectual power grow day by day and could not or would not own that day by day its working frayed more and more the thread of the thin-spun life.

He had never lost his early preference for quiet study. Although he had relinquished history and the philosophy of history in favor of political economy, he remained by the bent of his mind an historian. He had learnt much from the economic writings of Cliffe Leslie which are distinguished by the constant use of the historical method; but he saw that without the help of deduction, this method can serve only to accumulate a mass of unconnected and unserviceable facts. He did full justice to the logical power displayed in the economic writings of John Stuart Mill and Cairnes. It is the more necessary to bear this in mind because in his essay upon "Ricardo and the Old Political Economy" he assailed their spiritual father with somewhat of youthful vehemence and even styled the Ricardian system an intellectual imposture. He felt very strongly that our English economists had made, not too much use of logic, but too little use of history, and, by constructing their theories upon too narrow a basis of fact, had lessened as well the value as the popularity of their science. He saw that these theories needed correction and re-statement. He would not have denied their partial truth nor would he have echoed the newspaper nonsense about political economy having been banished to the planet Saturn. Here as in so many other instances his intellectual fairness and love of truth checked a sensibility as keen as that of Owen or Ruskin.

He was anxious to make some worthy contribution to economic literature, and finally chose for his subject the industrial revolution in England. Considering the magnitude of that revolution, which turned feudal and agricultural into democratic and commercial England, it is somewhat surprising that its history should have remained unwritten to this day. For Toynbee it had a peculiar fascination. During the



last two years of his life he accumulated a great deal of material for the work and made original investigations upon several points, especially upon the decline of the yeomanry. Part of the knowledge thus amassed he gave out in a course of lectures delivered in Balliol College; and from the notes of these lectures the fragments which have been published were collected. Few and broken, indeed, they are; yet full of unavailing promise. Other economists have shown greater dialectical power; but none have made a happier use of historical illustration. He had the faculty of picking out from whole shelves of dusty literature the few relevant facts. These facts he could make interesting because he never lost sight of their relation to life. Political economy was always for him a branch of politics, in the nobler sense of that term; the industrial revolution but a phase of a vaster and more momentous revolution, touching all the dearest interests of man.

The problems suggested by a competitive system of society were always present to his mind. He felt as deeply as any socialist could feel the evils incidental to such a system, the suffering which it often brings upon the weak, the degradation which it often brings about in the strong. For the cure of these evils, however, he looked further than most socialists do. Owning that competition was a mighty and, in some respects, a beneficent power, he wrote that "of old it was hindered and controlled by custom; in the future, like the other great physical forces of society, it will be controlled by morality." To the same effect is the following passage: "In the past all associations had their origin in unconscious physical motives; in the future all associations will have their origin in conscious ethical motives. Here, as in so many other things, the latest and most perfect development of society seems to be anticipated in its outward form by the most primitive; only the inner life of the form has changed." In the meantime, he held with John Stuart Mill that the problem of distribution was the true problem of political

economy at the present day. Certainly it was the problem which most interested him, and his way of handling it was characteristic. With the habit of forming somewhat startling ideals, he had the instinct of scientific investigation. Convinced that feeling, however pure or intense, is not alone equal to the improvement of society, he was always toiling to find in the study of that which is, the key to that which ought to be. He would bury himself in the dry details of an actual economic process, and emerge only to suggest in the soberest terms some modest but practicable amelioration. This singularly positive side of his enthusiastic nature is illustrated by the letter to Mr. Thomas Illingworth of Bradford, which is printed at the end of this memoir.

Toynbee's interest in the welfare of mankind was too eager and impatient to be satisfied solely by the pursuit of truth. He was zealous for that diffusion of political knowledge which halts so immeasurably behind the diffusion of political power. He felt that even now, in spite of better education and greater opportunities of reading, the bulk of the nation scarcely partakes in the progress of science. The growing wealth of recorded experience, the enlargement and correction of thought are real only to a few students who exercise almost no direct influence upon the course of public affairs, whilst public men who do exercise this influence are so enslaved to the exigencies of each passing day that they have little time or strength to spare for the education of their followers. Toynbee was anxious to utilize for political reform the ferment of thought at the Universities. With this purpose he drew together into an informal society several of the most studious among his younger contemporaries. Each member was to select for his special study some principal department of politics, but all were to work in concert, and to maintain, by meeting from time to time for discussion, a general level of sympathy and information. When they had matured their views they were to take part in forming public opinion by writing or by speaking as best suited each man's talent and

opportunities. The conception of such a society had long been familiar to him and this was not his first attempt to carry it out. He would dwell mournfully on that practical impotence of clever and earnest University men which has afforded so much matter for exultation to the enemies of polite letters. "Every one is organized," he wrote, "from licensed victuallers to priests of the Roman Catholic Church. The men of wide thought and sympathies alone are scattered and helpless."

The society held its first meeting in the June of 1879 and continued for three years to meet once a term, sometimes in London, but oftener in Oxford. As time went on it was joined by one or two younger men who shared the studies and aims of the original members. Toynbee was throughout the guiding and animating spirit. Deep differences of opinion necessarily came to light, but those who differed most from Toynbee would be the first to confess how much they have learnt from discussion with him. So penetrating was his earnestness, so thorough his dialectic, that the faculties of all who listened to him were strained to the utmost. All were forced to ask themselves what they really believed and why they believed it. Toynbee was anxious that these debates should not prove merely academic; and he and his friends spent some time in considering how they could best preach their doctrines. He himself had a gift of addressing large audiences; but this gift is rare, and it is hard to find any other mode of communicating new ideas to the people. A volume of essays can only be published at a considerable cost; pamphlets are scarcely read at all; and a newspaper can be floated only by those who have considerable capital or are totally subservient to a political party. In this as in all other efforts to diffuse enlightenment we have to shift as best we can; put forth our opinions when we get a chance and not expect any one else to mind them.

Toynbee had not forgotten his own success in addressing the Tower Hamlets Radical Club. He was resolved to use

the power which he had then found himself to possess in communicating to the artisans of our great towns the ideas which he had matured in the quiet of Oxford. It was his design to give every year a certain number of lectures upon such economic problems as were of the most pressing practical importance to workingmen. These lectures were not to be merely academic or merely partisan. They were to combine the directness and liveliness of a party harangue with the precision and fairness of a philosophical discourse. He knew how prejudiced against political economy are the poor; but he knew that mistakes made by economists have helped to strengthen that prejudice, and he believed that it would yield to frankness and sympathy. He believed that the masses were eager for illumination—that they would be delighted to follow any intelligent man of whose sincerity and disinterestedness they felt assured. He used to refer to the success which had attended Mr. Bradlaugh's lectures and to the influence which they had exerted, and would urge that other preachers with equal courage and faith might gain a greater success and wield a far better influence.

It was in the January of 1880 that Toynbee began his series of popular addresses by giving at Bradford three lectures upon Free Trade, the Law of Wages and England's Industrial Supremacy. He did not write out his lectures beforehand nor did he speak from notes; but having mastered his subject by intense thought, trusted for fitting words to the inspiration of the moment. This practice, whilst it increased the fatal strain upon his nervous system, added much to the grace and naturalness of his delivery. From the faces of expectant listeners he drew the needful stimulus to his power of expression. He spoke rapidly and continuously, yet with clearness and accuracy. He carried away his audience, and their momentum carried him swiftly and smoothly to the close. At Bradford his lectures were well attended and well received by both employers and workmen. He was always anxious to address both classes together and



not separately, for with him it was a prime object to soften the antagonism between capital and labor, to show that the true, the permanent, interests of both are identical. The address upon Wages and Natural Law he subsequently delivered again at Firth College, Sheffield, and it has been reprinted from the shorthand writer's reports. Such an address cannot be expected to contain much abstruse or recondite speculation. It illustrates very happily, however, the constant drift of his economic teaching. It enforces Mill's distinction between the laws of production, which are laws of nature uncontrollable by our will, and the laws of distribution, which are, to a considerable extent, the result of human contrivance, and may be amended with the growth of intelligence and fairness. Thus, it points out that the earlier economists arrived at their conception of a wages fund by leaving out of account many of the causes which affect the rate of wages, by forgetting that it is not competition alone that determines the rate of wages; that trades unions, that custom, that law, that public opinion, that the character of employers all influence wages—that their rate is not governed by an inexorable law, nor determined alone by what a great writer once termed "the brute law of supply and demand." This address is also remarkable for a candor uncommon in those who profess themselves friends and advocates of the working classes. Such persons seldom address their clients without slipping into a style of flattery. Toynbee, who loved the people with all his heart and was, perhaps, prejudiced in their favor, avoided this pernicious cant. He reminded his hearers that a rise in wages was desirable in the interests of the whole community only in so far as it led to a rise in the civilization of the wage-earners. "You know only too well," he said, "that too many workingmen do not know how to use the wages which they have at the present time. You know, too, that an increase of wages often means an increase of crime. If workingmen are to expect their employers to act with larger notions of equity in their dealings in the labor market, it is, at least, rational that

employers should expect that workingmen shall set about reforming their own domestic life. It is, at least, reasonable that they should demand that workingmen shall combine to put down drunkenness and brutal sports." Coming from a speaker whose affection was unquestionable, sentences such as the above were taken in good part by the workmen who heard them. Toynbee never found that he lessened his popularity by abstaining from adulation of the people.

In the course of January and February, 1881, he delivered twice, once at Newcastle and once at Bradford, the lecture entitled "Industry and Democracy." This lecture was a study of one aspect of that great industrial revolution which was ever present to his thoughts. Its central idea may be roughly stated as follows. A series of extraordinary mechanical inventions extending over the latter half of the eighteenth century shattered the old industrial organization of England and in particular broke the bond of protection and dependence which formerly united the employer and the employed. But some time elapsed before the revolution in the industrial was followed by the revolution in the political system. Some time elapsed before the workman's economic isolation was followed by his political enfranchisement. He had lost his patron and he was slow in learning to help himself. This interval was for him a period of suffering and for the whole body politic a period of danger. But this epoch of dissolution has been followed by an epoch of new combinations. The workmen have organized themselves for their economic and social advancement; and they have acquired the fullest political status. They are now independent citizens with ampler rights and duties than could have been theirs in the old-fashioned industrial and political order; and thus in England, at least, the acutest crisis of the double revolution, political and economical, has been surmounted, and an age of tranquil development has become possible. Such is the bare outline of an address abounding in knowledge and in thought, which fixed the attention of very large audiences.

A year later he gave at Newcastle, Bradford and Bolton an address upon the question—"Are Radicals Socialists?" This was one of the many attempts that have been made to settle the true line of separation between the functions which must be discharged by the state and the functions which may be discharged by the individual. It proposed three tests whereby to try the wisdom of interference in any particular instance by the state: "first, the matter must be one of primary social importance; next, it must be proved to be practicable; thirdly, the state interference must not diminish self-reliance." It will probably occur to all who have pursued inquiries of this nature that the hardest thing is, not to lay down good rules, but to insure their observance. In our age, at least, it is not so much want of knowledge as the zeal of narrow enthusiasts or the interested ambition of political intriguers which leads to an excessive or injudicious interference by the state with the individual.

These were not the only addresses which Toynbee gave in pursuance of his favorite plan; but they have been singled out here, because they have been reprinted among his literary remains and are characteristic both in thought and expression. They are all pervaded by a hopefulness heightened, perhaps, by youth, yet innate in the man. Toynbee thought that the conditions for solving the question of the relation between capital and labor were to be found, if in any country, in England. The old habit of joint action for public ends by men of every class; the ennobling traditions of freedom and order; the strong sense and energetic moderation often displayed by the workmen, particularly in the north, their experience acquired in organizing and administering trades unions and co-operative societies; and the large mass of property already held by them; all these circumstances convinced him that, in England at least, an even and steady progress was possible, if men of culture and public spirit would offer themselves to lead the way. He saw that the laboring classes have political power sufficient to insure the most serious and respectful con-

sideration of their demands and he trusted that the consciousness of this power and the spread of education would awaken in them something of that national feeling, that devotion to the interests of the state which has never yet been wanting in any age of our history. If in all this he was too sanguine, yet was his illusion a noble one which tended to verify itself. Could politicians or journalists ever address workingmen without trying either to bribe or to flatter them, we may be assured that workingmen would respond to something else beside bribes or flattery. It should be added that for these lectures he never took any remuneration beyond his travelling expenses, and not always this.

Of all the means employed by the poor to better their condition, the co-operative system appeared to him the most effectual. This system, we know, has proved more successful in distribution than in production; but it is capable of indefinite expansion in the hands of intelligent and honest men. Toynbee hoped that it might come to include a teaching organization. In the winters of 1880 and the following years, he used to lecture on political economy to a class of workingmen, which met at the Oxford Co-operative Stores. Sometimes he would have his hearers at his house on Sunday evenings and engage them in general conversation on economic subjects. In the course of his work with this class he formed many friendships with individual workmen, who regarded him with real devotion. They may still be heard to say, "We thought he would have done so much for us and for the town." "He understood us," they would say, "he took up things and led us in a way there seems no one else to do." Toynbee used also to contribute to the Oxford Co-operative Record. In a paper written for that periodical, entitled "Cheap Clothes and Nasty," he urged the workingmen to remember what hard and ill-requited labor, the labor, too, of their own class and their own kindred, was required to produce their cheap clothing. "The great maxim we have all to follow," he wrote, "is that the welfare of the producer is as much a matter of



interest to the consumer as the price of the product ;” wise and true words, how seldom borne in mind. At the Whitsuntide of 1882, when the co-operative societies held at Oxford their annual congress, he read a more elaborate paper upon “The Education of Co-operators.” He showed how needful and how much neglected at the present time is the education of men as citizens, and suggested that the co-operative societies might well provide for the civic education of their own members. He then sketched a programme of political and economical instruction. This programme may be thought ambitious ; yet the address as a whole is singularly balanced and judicial. He was well aware that there were many obstacles in the way of carrying out that which he proposed, and that the greatest of these obstacles is not the difficulty of finding competent teachers, nor the expense of employing them, but the apathy of those who were to be instructed. Such apathy he recognized as natural in men tired out with toil ; but although natural, not the less baneful. “Languor,” he truly said, “can only be conquered by enthusiasm, and enthusiasm can only be kindled by two things : an ideal which takes the imagination by storm, and a definite intelligible plan for carrying out that ideal into practice.” In this sentence he unconsciously summed up his own career. His own enthusiasm was not of the heart only, but of the whole man ; it was a reflective enthusiasm with definite aims and definite means ; and for this reason it did not pass away like the sentimental enthusiasms of so many generous young men ; on the contrary, as he grew older, it deepened until it became a consuming fire.

The duties of a Balliol College tutor, the study of a complicated science, the labors of a public lecturer upon political and social questions ; these might surely have been enough to task the energies of a delicate man who at his best could only work a few hours a day and was liable to frequent intervals of forced inaction. Yet there was another task from which Toynbee could not withhold his hand, a task which for him

comprised all others. Religion, it has been said, was the supreme interest of his life. His mode of thinking about religion has been hinted at above. He had too real a devotion to find repose in the worship of an abstract noun or an abstract sentiment. He felt that the religious emotion, like all other emotions, must have a real and an adequate object. He saw distinctly the weakness which has so often paralyzed the spiritual influence of the Broad Church. "Had liberal theologians in England combined more often with their undoubted courage and warmth, definite philosophic views, religious liberalism would not now be condemned as offering nothing more than a mere sentiment of vague benevolence. Earnest and thoughtful people are willing to encounter the difficulty of mastering some unfamiliar phrases of technical language, when they find they are in possession of a sharply defined intellectual position upon which their religious faith may rest."

Thus Toynbee, whilst in full sympathy with the modern critical spirit which regards as provisional all dogmas, even those which it may itself accept, was equally in sympathy with the instinct of devotion which in all ages has tried to find for itself a suitable dogmatic expression. The intellectual conceptions which support our spiritual life must always be inadequate and therefore variable; indeed they vary from land to land, from generation to generation, from class to class of a nation, from year to year in the life of the individual. But imperfect as these conceptions must be at any given time or place, they cannot be summarily remodelled; for they are the outcome of a vast experience, of an almost interminable intellectual history. They are improved sometimes by direct and severe criticism; oftener by the general growth of civilization and increase of knowledge. What is true of doctrine is likewise true of discipline and of ceremonies. All three have had a long development. The various Churches now existing in our own country are full of faults; but they cannot be swept away at a stroke, nor, if

they could, would there be anything better to take their place. To Toynbee a Church, like a State, was a mighty historical institution, the result of desires, hopes, beliefs which only in building it up could have found their satisfaction. Like a State, a Church had grown to be what it was and might grow to be something much better. How, he asked himself, could a devout man, totally without sectarian prejudice, assist even by a little that almost imperceptible growth? Certainly the survey of the state of religion in England at the present time does not readily suggest an answer to this question. Confusion is everywhere. We see many men of strong and cultivated intelligence, no longer obliged to fight for spiritual freedom, lapsing into an epicurean indifference, the more profound because it is so thoroughly goodnatured. This indifference is no longer confined to a few polished sceptics. It is shared by possibly the greater part of those who live by manual labor. It is not rare among women, always slower than men to part from the creed of their forefathers. A sincere piety is still common among us, but this piety, too often unenlightened, is frequently a principle of discord. Many zealous priests and laymen of the Established Church seem intent upon developing everything that is least rational in her doctrine, least sober and manly in her ritual. The Nonconformists, earnest as they are, seem condemned by their passionate spirit of division to everlasting pettiness and sterility. The Church of Rome, now as heretofore, invites, often with success, the timid and devout to abjure all the truths and all the liberties won in the battle of the last six centuries and to immure their souls in her dogmatic cloister. Look where we may, we nowhere behold realized the complete ideal of a national church. Religion, ceasing to be national, has lost half its life and power. Any reformation which is to restore its vigor must render it national once more.

For such a reformation the Church of England as by law established offers more facilities than any other. National it is, not only as the largest religious community in the kingdom,

but also as acknowledging in every Englishman a right to its ministrations, in having for its head the head of the state, and in admitting of regulation by the Imperial Parliament. Its history has always been linked with the history of the nation. If in former times it abused its power, it is at the present day tolerant and open to ideas to an extent unparalleled in the history of religion. It embraces members of the most various, not to say, contradictory opinions; and this fact, so often cited as its disgrace, is really its glory, since in a free and critical age no two thinking men can word for word subscribe the same creed. The only church possible in modern times is a church whose members, whilst several in thought, yet remain united in piety. The Catholics are not mistaken when they insist upon the power which springs from unity; the Nonconformists are in the right when they insist upon the freedom and the responsibility of the individual soul. The Church of England has endeavored, weakly indeed and intermittently, to reconcile unity with freedom. It has been able to do so because it has been a state church. The service of the state is perfect freedom as compared with the yoke of the priest or the yoke of the coterie. All that was best in the Church of England appeared to Toynbee indissolubly linked with her alliance with the state. Viewing the state as something more than a mechanical contrivance for material ends, as a union of men for the highest purposes of human nature, he did not regard it as inferior to the church or think the church degraded by connection with the state. The church and the state were to him but different aspects of the same society. Like his friend Thomas Hill Green he felt an intense antipathy to the pretensions of the sacerdotal party who understand by the freedom of the church the domination of the clergy. He felt an equally strong antipathy for the tyranny over thought and action exercised by the petty majorities in what are known as the free churches. He believed that real religious freedom was only possible in a national church, and that there could be no national church



without the assistance of the state. But he acknowledged that the Church of England cannot be truly national until she gives self-government to her congregations and releases her ministers from subscription.

To effect these changes had been the object of the Church Reform Union, formerly organized by Mr. Thomas Hughes and the Reverend Mr. Llewelyn Davies, but then in a rather sleepy condition. Toynbee tried to give it fresh life and induced these gentlemen to reopen the discussion of church reform. He persuaded several of his friends to join the Union and organized an Oxford branch, besides writing leaflets to enlist the sympathy of the laboring classes. He went so far as to appear at the Church Congress held at Leicester in the year 1880, and to deliver an address upon the subject of Church Reform. Had his life been prolonged, he might have achieved much for the cause. The eloquent enthusiasm with which he used to dwell upon the ideal relations of Church and State made a deep impression upon men of very different religious beliefs. The impression cannot be reproduced in words, because it was originally due to something unspoken and indefinable in the man. Something of the spirit in which he approached the question may be caught from the following passage :—

“To teach the people, the ministers of religion must be independent of the people, to lead the people, they must be in advance of the people. Individual interests are not always public interests. It is the public interest that a country should be taught a pure and spiritual religion ; it is the interest of religious teachers to teach that which will be acceptable at the moment. It is for the public interest that religion should be universal, that it should be a bond of union, that it should be progressive. The State, and not the individual, is best calculated to provide such a religion. We saw before that freedom being obtained, it was religion that was to weld free but isolated beings into a loving interdependent whole. Which is the more likely to do this—a religion wise and rational, com-

prehensive and universal, recognizing a progressive revelation of God, such as the State may provide, or a religion provided by individual interests which is liable to become what is popular at the moment, which accentuates and multiplies divisions, which perpetuates obsolete forms, and has no assurance of universality of teaching? It is scarcely too much to say that as an independent producer can only live by satisfying physical wants in the best way, the independent sect or independent minister can only live by satisfying spiritual wants in the worst way. If I thought that disestablishment were best for the spiritual interests of the people, I would advocate it, but only on such a principle can it be justified, and my argument is, that spiritual evil, not good, would attend it.

“What is really required is a body of independent ministers in contact at once with the continuous revelation of God in man, and in nature, and with the religious life of the people. The State alone can establish such a church organization as shall insure the independence of the minister, by securing him his livelihood and protecting him from the spiritual despotism of the people. I believe the argument holds good for religion as for education, that it is of such importance to the State itself, to the whole community collectively, that it behoves the State not to leave it to individual effort, which, as in the case of education, either does not satisfy spiritual wants at all, or does not satisfy them in the best way. If I chose to particularize, I might here add that the connection of religion with the State is the most effective check to sacerdotalism in all its different forms, and sacerdotalism is the form of religion which can become fundamentally dangerous to the State. It injures the State spiritually by alienating the greatest number and the most intellectual of the members of the State from religion altogether; it injures the State temporally by creating an antagonism between Church and State—a great national calamity from which we are now entirely free.”

It must not be concluded from the above quotation that Toynbee regarded as just or expedient the present impotence

of the laity of the Church of England. He would have been in favor of investing each congregation with almost any power short of the power to dismiss its minister at discretion ; but he thought that the ultimate control of the Church was more safely vested in a democratic Parliament than in the inhabitants of each parish. In the same spirit of compromise he would have abolished "clerical subscription," the formal declaration of assent to the Articles and the teaching of the English Book of Common Prayer, which is demanded from every minister of the Established Church. It might have been objected to him that, by abolishing "subscription," the clerical profession is thrown open to men of every religion and of no religion. He might have replied that the only practical consequence of enforcing "subscription" is to exclude from the ministry a few delicately spiritual natures, who honor it too much to begin their professional life with solemnly assenting to a series of obscure propositions drawn up by the statesmen of the sixteenth century. Nevertheless, we must allow that Toynbee failed fully to comprehend the difficulty of his undertaking. He had found his religion for himself, and it was all the more real to him because freed from everything which was not spiritual. He could not, therefore, realize the extravagant value which most of the members of every Church attach to the accidents of their spiritual life, especially to all modes of doctrine, ritual or government which serve to distinguish them from other Churches. Men are most partial to that which is distinctively their own. Let it be trivial, unmeaning, mischievous, still it is theirs, and, as such, sacred. The smallest concessions upon the part of the Established Church would often have hindered the rise of new sects. The differences which divide most sects from one another and from the Established Church are, in many cases, too small for the naked eye, and intelligible only when subjected to the historic microscope. It does not follow that these concessions would have been easy—that those differences can now be healed.

Whilst brooding over ideals of Church and State, Toynbee was always ready to lavish time and thought in furthering the welfare of his immediate neighbors. In devotion to the welfare of the city of Oxford, he rivalled his friend Professor Green. In the year 1881 he was appointed to the board of "Guardians of the Poor." The granting of relief, except within the walls of the workhouse, he had always condemned on the ground that it tended to lower wages and to relax industry; and when he became a guardian he uniformly acted upon this opinion. At the same time he felt the cruelty of compelling the deserving poor to take refuge in the workhouse, and the necessity of replacing "outdoor" relief by organized charity, which should assist them in the most effectual manner and make between the givers and receivers a bond of kindness and of gratitude. He therefore joined the committee of the Oxford Branch of the Charity Organization Society, thus helping to establish a concert between the public and the private relief of distress. He took extraordinary trouble in the investigation of cases of poverty and in securing uniformity and thoroughness in the operations of the Society. Nothing more enhanced the regard felt for him by the working men of Oxford than did these labors. They were indeed too much for one so weak in body and so heavily burthened with other employments. But he felt the necessity of not merely conceiving and uttering, but also in some small degree executing fine ideas. As a Christian and a citizen he thought himself in conscience bound to take his share of social drudgery, and to this austere sense of duty he sacrificed the few hours of rest which he so much needed, the scanty remains of strength which might have been employed in so many other ways more likely to bring fame and power. It was the reward of Toynbee's thoroughly sincere and practical spirit that he was always learning. His imagination was ever prone to pass beyond the bounds of possibility; but his habit of action constantly checked the disposition to reverie.

In spite of all the public labors which he had imposed upon



himself he took the utmost pains with his pupils, the selected candidates for the Indian Civil Service. He chiefly taught them political economy and could not go very deeply into that subject, because with them it was one of a multitude in which they had to be examined. But feeling how enormous a responsibility would hereafter rest upon these lads he diligently studied the recent history and present condition of our Indian Empire. He did what he could to quicken their sense of the great interests committed to their charge. Nor did he fail to cultivate those kindly personal relations between tutor and pupil which are so precious an element in the life of the University. Besides his tutorship he held for some time before his death the office of senior bursar to Balliol College. In this character he made the acquaintance of the tenants of the College estates, with whom he speedily became popular. The work interested him as affording a practical knowledge of the state of agriculture. So highly did the College value his services in this and in every other capacity that it was resolved to elect him a Fellow, and the resolution was defeated only by his untimely death.

With such a variety of occupations Toynbee was not able to take many holidays in the years following his marriage. In the summer of 1880 he had spent five delightful weeks in Switzerland, and on his return journey had stopped at Mulhausen to inspect its cotton factories and *cité ouvrière*—a town of model houses for the operatives, which they might acquire in perpetuity by gradual payments. Part of the summer of 1882 he spent in Ireland, but this was not for him a time of rest. He used his utmost endeavors to become acquainted with the true state of the peasantry, would stop them by the wayside or sit for hours in their cabins listening to endless talk. Eager and excitable as he was, he could not use his intelligence without agitating his feelings. On his way home he made the acquaintance of Mr. Michael Davitt, who seems to have been deeply impressed with Toynbee's conversation. Mr. Davitt subsequently wrote when sending a contribution to the Memorial Fund :

"I had the pleasure of making the acquaintance of the late Mr. A. Toynbee during his Irish tour, as well as the advantage of a subsequent correspondence, and few men have ever impressed me so much with being possessed of so passionate a desire to mitigate the lot of human misery. In his death this unfortunate country has lost one thoroughly sincere English friend and able advocate, who, had he lived, would have devoted some of his great talents to the task of lessening his countrymen's prejudice against Ireland."

During the three terms from October, 1881, to June, 1882, Toynbee gave a course of lectures on the industrial revolution to students reading for Honors in the School of Modern History. These lectures were extremely well received. In the autumn of 1882 he offered himself in the North Ward of Oxford as a Liberal candidate for the Town Council, and made three speeches chiefly upon those aspects of municipal government which concern social reform, such as the administration of poor relief and the construction of artizans' and laborers' dwellings. He also threw out the idea of volunteer sanitary committees for the enforcement of the laws relating to public health. He himself took some steps towards the organization of such a committee, and many have since been established elsewhere. In the December of the same year he attended a Liberal meeting at Newbury, in Berkshire, and made a speech upon the Land Question and the Agricultural Laborer.

He had for some time been familiar with a book then little known and since famous—Henry George's "*Progress and Poverty*." In this year he wrote in one of his letters to a sister: "I have known George's book for a very long time. I always thought it, while full of fallacies and crude conceptions, very remarkable for its style and vigor, and while no economist would be likely for a moment to be staggered by its theories, it is very likely to seem convincing to the general reader. I remember last year at the Master's (*i. e.* Professor Jowett), Mr. Fawcett asking me to tell him about it—he had not read it even then." So much was he struck by the book

that he gave two lectures upon it at Oxford in the Michaelmas term of 1882. At the conclusion of the second lecture he made an earnest appeal to his younger hearers not to let the lawful ambitions of life, nor its domestic joys, make them forgetful of the lofty ideals or of the generous resolutions to ameliorate the condition of the poor and neglected which they might have cherished at the University. Many were deeply moved by this appeal, and he afterwards expressed the thought that he might have spoken with too much solemnity, but added, as if by way of excuse, "I could not help it." These lectures were the last which he ever gave in Oxford.

Indeed the end of all things earthly was now very near. For many months past he had been growing pale and haggard. He was wasted almost to a skeleton. His old gaiety had almost forsaken him. The death of his friend and teacher, Professor Green, had deepened his depression. Yet he sought no rest. He faced his growing labors with a stubborn resolution which concealed from his friends and possibly from himself an approaching failure of strength. In the January of 1883, he repeated at St. Andrew's Hall, Newman Street, London, his lectures on "Progress and Poverty." His audience was large and representative. At the first lecture it listened with attention. At the second, a small but noisy minority made a considerable disturbance. His strength had declined in the interval, and from the second lecture he went back to Wimbledon a dying man. In early childhood he had suffered concussion of the brain in consequence of a fall from a pony; and ever since then exhaustion with him was apt to bring on sleeplessness. So worn and excited was he now, that even with the help of the strongest opiates he could get no sleep. His mind, wandering and unstrung, turned again and again to the one preoccupation of his life; to the thought of all the sin and misery in the world. At times a strange unearthly cheerfulness broke through his gloom. He constantly asked to lie in the sun—to let the light stream in upon him; murmuring, "Light purifies—the sun burns up evil—let

in the light." He did not experience much bodily suffering ; but sleeplessness brought on inflammation of the brain ; and after seven weeks of illness he died on the 9th of March, 1883, in the thirty-first year of his age.

He lies beside his father in the churchyard of Wimbledon. It is a beautiful spot, overshadowed with the everlasting verdure of the ilex and cedar. There many generations have found rest from hope and desire ; but few or none among them all have been mourned so widely and so sincerely as Arnold Toynbee. It is easy to make a catalogue of the opinions, writings and actions of any man ; to enumerate in order the events of his life ; to sum up his virtues and his failings : and, this done, we have what they call a life. Yet life is the only thing wanting to such a performance. In every man of fine gifts, there is something, and that the finest element of all, which eludes so rough a procedure. There is something which those who have known him have felt without being able to express ; something which pervaded everything he said or did, something unique ; irreparable, not to be stated, not to be forgotten. Most indescribable, most exquisite is this charm blending with the freshness of early youth, like the scent of innumerable flowers floating upon a gentle breeze from the ocean. Length of added years would have brought the achievement of tasks hardly begun, the maturity of thoughts freshly conceived, and the just rewards of widely extended fame and reputation ; but it could not have added anything to the personal fascination of Arnold Toynbee, or enhanced the sacred regard with which all who had the great happiness to know and the great sorrow to lose him will cherish his memory whilst life endures.





## APPENDIX.

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LETTER TO THOMAS ILLINGWORTH, Esq., OF BRADFORD.

OXFORD, *January 21, 1880.*

*Dear Sir:* I have read your very clear account of the credit system as you have seen it in operation with great interest. The facts you give will be of much value as an addition to those usually found in the textbooks on Political Economy. If I understand you rightly, you advocate, as a remedy for the evils we both discern, the adoption of a cash system of trading. But I do not quite see *how* such a system is to be adopted, as long as it is the interest—the immediate interest of firms to give the long credit you speak of in order to obtain custom. That is (as you point out), excessive competition is at the bottom of a reckless credit system, and the problem is, how can we restrain this competition, and make it the *interest* of men to adopt a cash system. Take the analogous case of adulteration. This also is the result of excessive competition. The problem is—How can we make it the *interest* of manufacturers to sell pure goods? It is a well-known fact that honest manufacturers have reluctantly given in to the practice of adulteration because they found that if they refused to execute the orders offered them by merchants, other manufacturers accepted them, and they were driven out of the market. Of course, where a great firm with an established reputation have possession of a market, it may be for their interest to sell unadulterated goods—they may lose their market if their goods deteriorate. But when manufacturers are seeking to make a rapid fortune on borrowed capital, it is often for their interest to sell as much as they can in as short a time as possible. They do not want to build up a trade reputation, but to make money and to leave the trade.

Now I tried to show in my lecture the various restrictions which have made it the *interest* of men to be honest and humane. You cannot expect the great mass of men to be moral unless it is their interest to be moral. That is, if the average man finds that honesty, instead of being the best policy, is the high road to ruin, he will certainly be dishonest, and the whole community suffers. It is obvious that a man will not sell pure milk if he finds that he is being undersold by competitors who sell adulterated

milk to careless and ignorant customers—a man will not sell pure goods of any kind if he finds that he is being undersold by those who sell adulterated goods. But why is it possible for the manufacturer to sell adulterated goods? Because of the ignorance, apathy and helplessness of the isolated consumer. If he is not apathetic, he is ignorant and helpless. What does the ordinary consumer know about the quality of goods? Nothing at all.

Now I wished to show that owing to recognized causes consumers *were* forming unions to buy goods—the organization of consumption was taking place. And further I tried to hint the possible effects of this organization of consumption on (1) adulteration, (2) fluctuation of prices due to abuse of the credit system and the factory system. I think the cash system you advocate might be possible, where consumers are organized in unions, because it would there become the *interest* of both buyers and sellers to adopt it.

I agree with you that it is quite possible that retail distribution in the future will take place through enormous stores in the hands of companies or private persons—that there is nothing magical in co-operative stores. But whatever system prevails, there is no doubt that the excessive competition and waste in retail distribution will gradually diminish and that we shall have, instead of innumerable shops, groups of large stores with thousands of permanent customers. That is the first point—the *organization of consumption*. Next it is an admitted fact that the producers and consumers are drawing together owing to the telegraph and improved means of communication. Intermediate agents are being eliminated. One result is that *long credits* are not so necessary as before.

Now in these two points—the organization of consumption and the elimination of the distance between producers and consumers—I think, lies our hope.

(1) For (throwing aside the idea of contracts for terms of years) it will now be possible for the consumer through these stores to buy directly of the producer. The intermediate dealers whose interest it was to “dare forward,” etc., are eliminated—the consumer buys, say, at the ordinary trade credit. I need not attempt a more detailed explanation. The only difficulty I see is that different manufacturers in competing for custom might try and outbid each other, offering long credit; but it is more probable that the competition would affect price.

(2) As education and the taste for better goods grows stronger, the consumer will be able through the stores to employ skilful buyers to select unadulterated commodities which he individually could not do. The honest manufacturer would be protected from the competition of dishonest rivals.

(3) Speculation being minimized owing to the elimination of the intermediate agents, it would be possible for manufacturers to anticipate the demand for goods—and this would be facilitated by the concentration of consumers.

But I have said enough. I should like to have drawn out this idea in greater detail, but I am pressed for time. I hope what I have written is intelligible. The question I should like answered is—how would it be possible to procure the adoption of a cash system as things are at present. I do not wish to draw you into a correspondence, but I should like to have an answer on that point. As I said in my last letter, I hope I may some day have the pleasure of talking to you on this subject. I am,

Yours very truly,

ARNOLD TOYNBEE.

P. S.—(1) Is it in the least probable that merchants would associate in order to put an end to the abuse of the credit system? Is not competition too keen and are not interests too much at variance?

(2) Legislation on this point would be impossible—would it not?

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## THE WORK OF TOYNBEE HALL.

By PHILIP LYTTTELTON GELL, *Chairman of the Council.*

I have been asked to add to this brief account of Arnold Toynbee an equally brief description of the somewhat complex undertaking now widely known as "Toynbee Hall." Without having been founded by Arnold Toynbee, as is often imagined, without even aiming consciously at the embodiment of his views, nothing could better prove the wide acceptance and stability of those principles of social responsibility upon which Arnold Toynbee in his short life insisted.

Those who have read the preceding pages will have gathered how emphatic an answer Arnold Toynbee gave to the cynical or hopeless appeal of the apostles of *laissez-faire*, "Am I my brother's keeper!" In his own aspirations, in his conversation, in his theories of politics and economics, in the practical activity of his own life, this responsibility was the underlying and undying factor. The results of economical laws were to him not forces to be noted and then accepted, but forces to be wrestled with and controlled by the still superior ascendancy of human character. His sense of responsibility made him no Utopian philanthropist, his sense of human injustice and human suffering never made him revolutionary, but only intensified his civic earnestness. He was a good citizen who instinctively seized upon each and every civic institution, seeking to increase its special effectiveness and to ennoble its working for the benefit of his fellow citizens. His views as regards the National Church system and Education, as regards the Poor Law, the Volunteers or the Co-operative movement, the teaching of the Universities or the projects for their Extension in other cities, were all referable to one drift of his character—a natural value for an institution



or an organization wherever it had grown up, a far seeing intuition as to the ideal which it ought to serve in the interests of the common weal, and an instinctive tendency to take his own share as a good citizen in its work. I doubt whether this was conscious with him, but it was the same turn of feeling that took him into his lodging in the East End, into workmen's Clubs, or to the Board of Guardians and the Committee of the Charity Organization Society, which enlisted him in the Volunteers, which made him compete for a seat in his Town Council.

This appreciation of the influence and the duties of practical citizenship was far from being limited to Arnold Toynbee. It was at Oxford a time of reaction against the facile theories of the Radicals, of irritation against the cheap philanthropy of "advanced" views ending in no sacrifice of self; of scepticism as to the value of political and social programmes which took no account of the actual complexities of human life and character. At the suggestion of Rev. S. A. Barnett, a liberal London clergyman in an East End parish, who had many friends amongst us, a little University Colony had already been formed in Whitechapel to *do* something for the poor, and when we came to discuss the nature of our memorial to Arnold Toynbee, it was natural with many of us to urge that a "University Settlement in East London" would be the most fitting monument to his memory.

At the time, however, the majority of his friends dwelt rather upon his brief career as an economist, and it was decided to apply the fund placed at our disposal, "The Toynbee Trust," to the investigation of practical points of Political Economy. It was arranged that in each year a young economist should be appointed to spend the winter in some selected industrial centre, giving lectures to the workmen, and simultaneously investigating some important local feature of the industrial organization.<sup>1</sup>

But in that first winter the whole heart of the nation was stirred by the revelations of the *Pall Mall Gazette* as to the lives of the inhabitants of the metropolis, the "Bitter Cry of Outcast London." The facts set forth were neither new nor unknown. They were just those with which the clergy and other workers in East London were most familiar as the daily burden of their lives. But for once they were driven home into the hearts of the well-to-do, and for a space a great deal of emotion was expressed. The newspapers were full of East London. The air was alive with schemes for wild legislation. High officials visited the slums in person. The fashionable world followed in their footsteps. "Sanitary Aid Committees" were formed in every district to enforce upon landlords and parochial officials a stricter observance of the laws which should protect the homes of the poor. For the first time the actual condition of the people flashed upon the generous feelings of the Universities. There were stirring debates at Oxford

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<sup>1</sup> The subject upon which reports have been thus prepared so far are "Industrial Arbitration in the Northumberland Mining Industries;" "Economic Effects of Mining Royalties;" "Movements of Population amongst Trades."

and Cambridge. For the first time men were startled into a feeling of their responsibility towards the toiling millions whose labors make possible the academic life. Mr. Barnett seized the moment to urge his project of a University Colony in East London, where young men who had been touched with sympathy for the lives of their poorer fellow citizens might live face to face with the actual conditions of crowded city life, study on the spot the evils and their remedies, and if possible ennoble the lives and improve the material condition of the people.

The tinder took fire, and in a burst of general enthusiasm the "Universities Settlement Association" was formed to erect the necessary buildings—Lecture Rooms and Residential Chambers—and to provide funds to support the undertakings of the Residents. The motives of the founders cannot be better stated than in the words of the Appeal which we then issued.

"For some years past the momentous spiritual and social questions involved in the condition of the poor have awakened an increasing interest in our Universities; and the conviction has grown deeper that the problems of the future can only be solved through a more practical experience, and a closer intimacy and sympathy with the poor themselves.

"The main difficulty of poor city neighborhood, where the toilers who create our national prosperity are massed apart, is that they have few friends and helpers who can study and relieve their difficulties, few points of contact with the best thoughts and aspirations of their age, few educated public-spirited residents, such as elsewhere in England uphold the tone of Local Life and enforce the efficiency of Local Self-Government. In the relays of men coming year by year from the Universities into London to study for professions or to pursue their independent interests, there are many, free from the ties of later life, who might fitly choose themselves to live amongst the poor, to give up to them a portion of their lives, and endeavor to fill this social void. The universal testimony of those best acquainted with the squalor and degradation to which attention has been lately directed, affirms that there is less need of new legislation than of citizens who will maintain the existing law and create a public opinion amongst the poor themselves. Upon the Vestries, upon the Boards of Guardians, upon the Committees of Schools and of every public undertaking, educated men may find the opportunity of serving the interests of their neighbors: or even if such direct responsibilities cannot be assumed, they may help to create amongst their fellow-citizens the public opinion which insists on good administration. University men have already approached the Higher Education of the working classes in the University Extension Scheme and institutions with similar aims. The results have been most encouraging. The time has come for a far wider development. Art and Industrial Exhibitions have to be organized at the doors of the poor, and, what is more important, explained sympathetically to the throngs ready to visit them. Co-operative Societies have to be formed,

their principles established, and their wider issues developed. Other helpers are wanted for the work of the Charity Organization and Sanitary Aid Committees, for the organization of Clubs, Excursions, Childrens' Country Holidays, Concerts, and for every kind of Entertainment in which the culture born of ease may be shared with the toiling population.

"It is the object of the 'Universities' Settlement' to link the Universities with East London, and to direct the human sympathies, the energies, and the public spirit of Oxford and Cambridge to the actual conditions of town life. During the last few years many University men, following in the steps of Denison and Arnold Toynbee, have, on leaving the Universities for London, energetically responded to the varied calls for their aid. Such isolated efforts are capable of infinite expansion were the way once laid open, and it is now proposed to offer to those who are ready a channel of immediate and useful activity and a centre of right living. In a common life united by a common devotion to the welfare of the poor, those fellow-workers who are able to give either their whole time or the leisure which they can spare from their occupations, will find, it is believed, a support in the pursuit of their own highest aims as well as a practical guidance which isolated and inexperienced philanthropists must lack."

The residents (who live at their own charges)<sup>1</sup> have, by this time, under the general direction of Mr. Barnett, turned into fact many of the projects thus set before them. Upwards of 50 men have made their home for a time at Toynbee Hall, many having now gone on to their life work, richer in social experience and wider in human sympathy. The places of those who have left have been filled again and again, and the Chambers are generally occupied. Around the Residents a body of about 100 "Associates" have gathered whose homes lie elsewhere, but who co-operate with the residents in their undertakings, while the Guest rooms have afforded a temporary hospitality to constant relays of friends, Graduates and Undergraduates, who come to help or to learn for a few days at a time. Indeed the "Settlement" tends more and more to become a house of call for earnest men of all classes, drawn thither by their work, their enquiries, their friendships, or invited for the particular discussion of some social problem.

One object at least of the founders of the Association has been thus attained in the intercourse established between the life of our Universities and the life of our East End citizens. Meanwhile Toynbee Hall has already succeeded in making its influence widely felt among the crowded population in whose midst it is placed. By the working classes of East London it is rapidly being accepted as the visible embodiment of the almost legendary life and culture of the old Universities.

It would take too long to enumerate in detail all the educational and

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<sup>1</sup>The Rentals paid by them vary according to accommodation. They average about £1 weekly. The arrangements for Board and Service are managed by a Committee of the Residents and amount to about 25 shillings a week more.

social work in which the residents are engaged. They themselves possibly would feel they had won success in the degree to which they had kindled local opinion and enlisted in every kind of public undertaking the independent co-operation of their neighbors. The residents would judge themselves not so much by what they do, as by what they establish; not by the results which they could report, as by the spirit they have engendered. It is not, we believe, through external interference, but through the development of individual character, through the kindling of local opinion, through the education of civic spirit, and the direction of local energies, that ground can be permanently gained. In a democratic country nothing can be firmly achieved except through the masses of the people. Legislation may strike off the shackles of evil custom, and may supply methods of action, but when the people is enthroned, it is impossible to establish permanently a higher political life, or a more perfect social organization than the people crave for. Every social question has thus a moral question behind. Apathy, isolation, ignorance, selfishness in the masses—these are the powers of resistance to be vanquished before, by any chance, a self-governed people can possibly come to be a well-governed people.

It is not therefore so much by what they have done that the residents would count their days, as by what they may have led others to do. Has any one, coming to Toynbee Hall whether as boy or man, as a student, as a guest, or as a coadjutor in some social undertaking, gained an idea or a method, a belief, a sympathy or a principle which will take its own root in him and bring forth fruit for others' service? Has any one coming from East London or West become inspired with a higher sense of personal and civic duty, with a fuller faith of what can be attained by the fellow-service of fellow-citizens, and by an insight into the possibilities and the methods of social co-operation? Above all, has any one coming to Toynbee Hall, whether rich or poor, found there new sympathies, interests, and friendships, and left it with his old sense of class distinctions, class prejudices, and class antagonisms effaced, in a deeper conviction of human brotherhood and in the acknowledgment of a common responsibility for the common good?

Such at least would be our hope. How far realized we cannot judge. We can only indicate a few of the tangible undertakings which have begun to take root at Toynbee Hall.

Not only has the Hall become the centre of educational effort and social life in Whitechapel, but its members have gone out to take their share in the local government of the district and in all the various forms of public work, to which the manifold needs of a poor, populous, and neglected neighborhood give occasion.

The public rooms of the Hall have become an arena for the discussion of every kind of view, and a meeting place for every class. They have also been made a social centre for every branch of East End life and work, where our hospitalities have been extended to co-operators, workmen's clubs of all



kinds, students of every degree, elementary teachers and the representatives of every social movement amongst the people around. It is no exaggeration to say that many thousands of our poorer fellow-citizens, to whom Toynbee Hall was dedicated by the Universities four years ago, have found recreation and benefit in the rooms established for their use and entertainment.

On the educational side Toynbee Hall has been made the most prominent centre of "University Extension" in East London. A free students' library has been built and filled with books and readers, lectures and reading clubs ranging over the most varied subjects of moral, literary and scientific interest have been instituted. Technical classes have been established, musical societies have been formed, and above all the elementary schoolmasters and pupil teachers of the neighborhood, upon whom depends the future of the rising generation of citizens, have been welcomed to the society and the educational advantages of the Hall.

The educational associations which have gathered around us, besides promoting knowledge and developing intellectual interest, have created a spirit of comradeship among the students, inspiring them with a healthy sense of being fellow laborers in a great cause. Some of the most zealous local students, who are already more or less at home in Toynbee Hall, have taken up residence under academic discipline in "Wadham House," an adjacent building provided for the purpose by residents and their friends. Earning their living during the day, in the evening they pursue their studies in connection with our varied educational classes, and also take their part in its social work. The home thus offered to men who have to make their own fight for each step in self-improvement, introduces into the heart of East London the elements of an intellectual society, and it promises to form an independent centre of energetic practical citizenship.

It may afford some insight into the magnitude and variety of the claims made upon the time and energy of the inmates of Toynbee Hall, to give a summary of the work done by one of their number, though most of them have their own employments which limit their energies within bounds somewhat more circumscribed. Besides conducting a class of University Extension Students in popular Ethics, another of Pupil-teachers in English Literature, a class of workingmen in Political Economy, and a Sunday Bible Class of members of the St. Jude's Juvenile Association, the resident in question acted as Secretary to one of the Local Committees of the Charity Organization Society, as Secretary to a Ward Sanitary Aid Committee, as a School Board Manager, and finally as a member of the Board of Guardians. In each of these capacities he found new fields of work opening out before him. The Political Economy Class served as the nucleus of a body of workmen, who, as members of relief committees and as managers of the newly-started Recreative Evening Classes in Board Schools, have begun to do excellent service in charitable and educational administration, and have thus given practical evidence of the possibility of developing among the artisans of East London that spirit of citizenship—a very different thing

from political partizanship—which it should be the object of all true reformers to call into existence among the body of the people. In addition to these numerous undertakings, in all of which his efforts have been directed to evoking the co-operation of the people themselves, the resident in question has found time to devote many evenings to a boys' club, where boxing and single-stick have been substituted for mere horse-play with excellent effect upon the conduct and bearing of the lads. He has also taken a part in organizing foot-ball among the Board Schools of the district.

Records of similar, though in each case individual and distinctive, activity might be given with respect to other residents, but it is only possible to notice some of the principal results. The "Whittington," a club and home for street boys, was opened in 1885 by Prince Edward of Wales. It has done much useful work, and a cadet corps of Volunteers has been formed there. An effort has been made to unite the boy pupil-teachers of all the London Elementary Schools into one community, and by the agencies of cricket, rowing, and debating clubs, to kindle amongst them that *esprit de corps* which so strengthens the *morale* of our higher public schools. Numerous classes for pupil-teachers are conducted by members of the Hall, in all of which the object kept in view is not so much to increase the information of the already over-crammed, as to quicken their intellectual interest and widen their sympathies.

The Sanitary Aid Committee, which has its head-quarters at Toynbee Hall, has resulted not only in the removal of a number of specific nuisances, but in greater vigilance both on the part of the landlords and of the local authorities with regard to the condition of tenement houses. The opportunity which the visitors gain of becoming acquainted with the lives of the people and of entering into friendly relations with them is a secondary but valuable result.

Such are some of the undertakings which now centre round Toynbee Hall. It is an enterprise which if patiently and loyally maintained and effectively developed cannot but beget experience which will react most practically upon the thought of the educated classes on whom in a democratic country falls so deep a responsibility for local and central good government. The present residents at Toynbee Hall are we hope the pioneers of a permanent movement re-establishing amongst the leisured classes the sense of their civic obligations. In the meetings which are held in the various Colleges in support of the work, the interest of the undergraduates is attracted to the social questions which confront their representatives in Whitechapel, and seed is sown which will bear fruit in years to come, when the undergraduates of to-day become the administrators, the landlords, the journalists, the law makers, the public opinion of their time. Later as these undergraduates leave the university, Toynbee Hall offers to all an opportunity of direct personal experience of social problems, and a channel for the expression of every social sympathy. These are among the advantages with which the movement has endowed the Universities. Yet on the

other side we are glad to realize how much tangible good our fellow citizens have reaped in education, in enlightenment, in social stimulus, in the development of local life and the reform of local evils. The principle of personal service, personal knowledge and personal sympathy remains the key-note of every endeavor. On each side men have learnt to appreciate each other better, and many a link of cordial and deep-rooted friendship, based on common tastes, common associations and common work for others' good, now binds together classes which had otherwise been strangers, and possibly antagonists.

PHILIP LYTTTELTON GELL, M. A.,

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## THE NEIGHBORHOOD GUILD IN NEW YORK.

BY CHARLES B. STOVER, A. B.

An apology for appending to the foregoing narrative of the splendid achievements of Toynbee Hall an account of the small doings of the Neighborhood Guild is supplied first, by the fact, that in some measure the descent of the Neighborhood Guild is traceable to Toynbee Hall, and secondly, by the endeavors of the Guild to become the Toynbee Hall of New York City.

The Neighborhood Guild was founded by Mr. Stanton Coit early in 1887, at 146 Forsyth St., New York. After a residence of several weeks among the tenement-house people, face to face with the great problems presented by their lives, Mr. Coit began his work of reform in a tentative manner, by inviting to his own cheerful apartments a club of half a dozen boys, who had been meeting in the dismal room of a poor old blind woman. These boys brought in others, and soon Mr. Coit felt encouraged to rent the basement of the tenement, in which he lived, for a club-room. Here the boys, or young men, their average age being eighteen years, were organized into a club. And afterwards, as the necessary volunteer workers were secured, three other clubs were formed, one consisting of young women, another of little boys, and the last, of little girls. A kindergarten also was established at an early date. These various organized bodies of young people together form the Neighborhood Guild. Its motto is: "*Order is our Basis; Improvement our Aim; and Friendship our Principle.*"

In the second year of the Guild's history, the formation of a similar set of clubs was undertaken in Cherry St., and now is being carried on with such ease that our castles in the air become less insubstantial, and our hope grows firmer that the Guild may multiply its clubs on all sides, until, let us say, they shall be found in every election-district of our city ward. Then, when the whole people shall be organized for reform, when all the latent love of the beautiful and the right which the coarseness of tenement-house life and the cares of poverty blast and make unfruitful, shall be stirred up and developed by extensive coöperation for individual and social progress, then shall the workers for righteousness strive to some purpose. But now the workers of iniquity flourish. The poor people of our district are represented in the State Assembly by one of the most notorious scamps in the history of New York politics,—a saloon-keeper, a gambler, a friend of "crooks" and a tool of lobbyists. Four times in succession this law-breaker has been elected a law-maker of the State of New York. "He



knows every man, woman, and child in the ward." There is the secret of his power. So says one of his "heelers." Verily the children of this world are wiser in their methods of work than the children of light.

Thus to organize the young people into numerous clubs is to take advantage of their social instinct which, in our tenement-house district, is already finding its gratification in countless "Pleasure Clubs," the height of whose ambition is a chowder-party in summer and a ball in winter. These Pleasure Clubs encourage lavish expenditure of small earnings, vulgarize the tastes, and readily become centres of political jobbery. The Neighborhood Guild Clubs are designed to encourage thrift and fellow-helpfulness, to purify and exalt the tastes, to excite opposition to all forms of injustice, and to kindle devotion to the common weal.

I shall write but briefly of the Guild's forms of entertainment and education, which for the most part are those employed at Toynbee Hall and in the "Annexes" of modern churches; and then more fully of the Guild as a College or University Settlement. Each club meets twice a week. In the older clubs one-fourth of the income from the weekly fee of ten cents is spent for the relief of the sick and the poor. It is our endeavor also to have the clubs bear a portion of the expense of practical reforms. They bore one-third of the expense of keeping our street clean during the summer. The Kindergarten, in charge of two well-trained teachers, gleams like a fairy-land amid the gloomy and depressing tenements. Of the fifty children in attendance at the close of last session, but three are in this year's class. This may be largely ascribed to the removal of families, which among the poor of the city so often interrupts good influences. The untamed small boys, though long subjected to our strongest subduing forces, are still sadly prone to remind us, that for them, to be noisy is to be happy. They tire of every game but base-ball. The piano and song are great aids to composing their wild spirits. The chief instruction given the two girls' clubs is in housewifely duties. The larger girls have been carefully trained in hand-sewing, including the art of fine embroidery. Several times they have coöperated with the young men's club in getting up musical, literary, and theatrical entertainments. The young men have received the most varied instruction, embracing clay-modelling, wood-carving, debating, public declamation, parliamentary practice, singing, drawing, gymnastic and military drilling. Numerous desultory lectures have been delivered. At present a somewhat systematic effort is being made to give them a grasp of the leading phases of the world's history. Several classes in elementary studies have been formed.

Our "Dancing Evening," for a while weekly, then, as our more serious work increased, semi-monthly, is to be reckoned among the educational, as well as among the entertaining, meetings of the Guild. Only an ignorant fanatic could say that by permitting the young men and the young women to dance together, we are training them for the Bowery dance-halls. People of common sense, with no slight disapproval of dancing, have come here

and for a long while observed its effects upon these young people, and now unhesitatingly declare that these social meetings, always under the supervision of some of the Guild's workers, have proved a school of graceful, modest, and chivalrous manners, all the corrupting influences of dance-hall and fashionable ball to the contrary notwithstanding.

In the summer-time, to a limited extent the clubs leave the city for a breath of fresh air. The little girls, in several parties, spent a week at the country home of their teacher. Very generous invitations were extended to the young women's club to spend a week or more at the sea-shore, and to the young men's club to summer in the Catskills; but not one of the young men could leave the city, and only three of the young women could go away, chiefly because their employers would not grant them leave of absence. Several excursions of a day have been made by two or more of the clubs to the shores of Staten Island, where bathing, boating, and athletic sports afforded grateful recreation.

The work of the Guild, as thus outlined, is carried on in the main by volunteer workers, who in this second year of the Guild's history numbered twenty-two, one-half ladies and one-half gentlemen. Of these workers the great majority are up-town residents, who come to the Guild an evening or two every week. They bring with them gentleness, kindness, culture, knowledge, a rich store of human sympathy, and open eyes to discern the signs of the times. These are some of the strands which help to bridge over that angry flood of passions which is ever tending to sweep the social classes farther apart. The Guild is not tainted with fashionable "slumming." A little of its work has been done up town. One lady in her own home instructed a young man in piano-playing and singing; another in her own home instructed a girl in embroidering; and still another gave lessons in wood-carving to three young men. Would there were more such intercourse between up-town people and tenement-house people! The Guild aims to be a mediator between the cultured and the uncultured, between the gifted and the ungifted. Ye that have talents, why not impart to him that has none? What a university might be established in this city, its curriculum perhaps not as varied as that of a regular university, but possessing an unrivalled endowment of saving social forces, if a thousand young men and women from the tenement-houses were welcomed weekly into as many different homes of the up-town people, there to receive some acquirement from more gifted fellow-creatures!

The Guild's most distinctive feature is found in its College men, resident together in a tenement-house. Of these there have been five,—Mr. Stanton Coit, Ph. D. (Berlin Univ.), Mr. E. S. Forbes, and Mr. W. B. Thorp, all Amherst graduates; Mr. M. I. Swift, Ph. D. (Johns Hopkins University), a Williams graduate, and the writer, a Lafayette graduate. Three of these men have been students at the University of Berlin. Mr. Coit, during his student life abroad, became well acquainted with Toynbee Hall, where he was enriched with new ideas and impulses. However, his prime endeavor

here seems to have been not to model the Guild after Toynbee Hall, viewed as a University Settlement, but rather, in accordance with his own ethical system, so to organize the people around the *family*, as the unit, as to originate forces of social regeneration. This organization has not extended to the parents. In describing his work among the young, Mr. Coit has said that he resolved to do for them, what parents of wealth and leisure would do for their children. Also another Guild resident came in contact with Toynbee Hall while abroad, and, at the first moment of his acquaintance with the Guild, became attached to it by the expectation of its becoming another Toynbee Hall. I well remember when in May, 1887, I asked Mr. Coit whether such might not be the development of the Guild, he replied, "Will you help to make it a Toynbee Hall." He made special trips to Amherst and Johns Hopkins to enlist men in the movement. Mr. Swift, for whom the idea of a People's University had great attractions, helped along the Toynbee Hall movement here by his successful management of a Social Science Club, in which, to a limited extent, workingmen were brought in contact with University men.

Let us notice some of the reasons for developing the Neighborhood Guild into a Toynbee Hall. First. There is a numerous class of educated young men, who are deeply interested in the social problems of to-day, their sympathies for human suffering the warmest, who yet would be hampered, if put in ecclesiastical leading-strings. Such would find a field of labor in a Toynbee Hall. Let it not be thought, that I presume to speak to the discredit of the Church. I am regarding her conservatism in methods of work simply as a matter of fact, which exercises a decided influence over the career of many a young man. I know that one, inspired by the love of Christ and his fellowmen, applied for work to a person in authority in city evangelization, and was dismissed with the rash words: "The Lord God has no work for you to do;" because, forsooth, his theology seemed "wishy-washy" to the rigid dogmatist. Such a young man is welcome here. Not because the Guild has a liking for vague theology, but because it believes that this world is too badly off to afford to let a single spark of enthusiasm for humanity be quenched.

Further, a Toynbee Hall could easily approach the workingman, who is now estranged from the Church. Ex-Pres. McCosh has lately said that when he first visited our country, he was often asked, "What do you think of our congregations?" and he answered, "I think much of them, but where are your laboring classes?" and he adds, "Where is the laboring man in our Churches? is the question I am still putting, seeking an answer." It should also be noticed that the Church is much estranged from the tenement-house districts. As the Church is doing very little for the down-town people, a University Settlement would here find a large field of labor. These people should not be utterly forsaken. According to the New York "City Mission Monthly," in our ward, the 10th, the population is 47,554, and the number of churches and chapels, five. And according to Dr. Josiah Strong,

while the increase in the population of New York City, since 1880, was 300,000, the increase in the number of churches, during the same period, was only four. I do not wish to imply that a Toynbee Hall would be a complete substitute for the vanished churches; but would anyone deter another from pouring balm upon a cut finger, because there is no surgeon at hand to remove some internal cancer? So I believe in this University movement, because it *does* benefit men. How far it falls short of blessing and regenerating the entire man does not enter into consideration now. This is the Guild's relation to the Christian Church. Never, not even when Mr. Coit was here, was the Guild antagonistic to the Church. I say, not even when Mr. Coit was here; for his late position, as Assistant Lecturer to the New York Society for Ethical Culture, seems to have created, in some minds, the impression that this Guild is a work of that Society, and that the spirit of Ethical Culture, with its pronounced repudiation of all theology, rules in the Guild. These notions are utterly false. The personal help of Christians in the Clubs was always welcomed by Mr. Coit; and we have even been scrupulous enough to hold all our meetings on week-days, that on Sunday no member of the Clubs might be withdrawn from attendance on Sunday School or Church.

Further, various educational, sanitary, social, and political reforms could be undertaken by a Toynbee Hall with fewer restraints than they could by the Church. Certainly in political action it could engage with a freedom to which the Church is a stranger. From a Toynbee Hall might proceed a thorough purification of this sink of political corruption. Persons resident here would acquire that familiarity with the men and the affairs of the district which is so necessary for a successful reform movement. Our local "boss" says: "We will not allow the residents of Murray Hill to dictate to us." May the time come when a large band of intelligent, fearless, and public-spirited young men, residents here, shall labor perseveringly for the purity of the ballot and the dethronement of the corrupt "bosses!"

Something may be said also in favor of such a University Settlement from a purely intellectual point of view. That the University-bred mind would itself be profited by frequent contact with the masses of a great city no one doubts. But very generally it is supposed that the University-bred mind is altogether unsuited to instruct and inspire the masses. I remember that once in a Social Science Club, made up, according to the Club's parlance, of *proletaires* and professors, a University man, having alluded to the difficulty, which a person like himself has in reaching the understanding of the people, a workingman remarked,—“I once heard Huxley lecture and had no difficulty in understanding him.” Does the multitude have any difficulty in understanding the political addresses of our leading lawyers and statesmen? Is the popular mind capable of grasping only the platitudes of pettifoggers? Why is it that in New York City the ablest and most attractive preachers are in the pulpits of the rich? If Christ and St. Paul were here, would they confine their preaching to wealthy churches, and



think the poor of the tenements quite incapable of appreciating their sermons? I dare say that the most powerful and popular of the preachers to men of wealth and culture could, with little effort, render themselves both powerful and popular in the slums. Let not the University men be misled by the foibles of the Church. A great work can be done by them right in the heart of the tenements. That the intellectual barriers to their success can be overcome, the story of Toynbee Hall amply testifies.

May this monograph concerning Arnold Toynbee and the accompanying sketch of the work of Toynbee Hall incite many an American student to a similar work in his own land!

II-III

The Establishment of Municipal Government

IN

SAN FRANCISCO



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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The Establishment of Municipal Government

IN

SAN FRANCISCO

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# THE ESTABLISHMENT OF MUNICIPAL GOVERNMENT IN SAN FRANCISCO.

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The events associated with the establishment of a municipal government in San Francisco extend over three quarters of a century, from the foundation of the Spanish pueblo, in 1776, to the adoption of the city charter passed by the first legislature of the State of California, in 1851. Within this time it is possible to observe three somewhat clearly defined periods. The first is the period of Spanish settlement and stagnation; the second is the period of transition, extending from the Conquest to the adoption of the charter of 1850; the third period ends with the adoption of the charter of 1851.

## I.

The site of San Francisco was first trodden by Europeans in the autumn of 1769. At the same time, the bay of San Francisco was discovered. About three years later, in the spring of 1772, Pedro Fages and his followers looked out through the Golden Gate from the foot-hills of Berkeley. Towards the end of 1774, Bucareli, the viceroy of Mexico, wrote to Rivera and Serra that he intended to establish a presidio at San Francisco, and by an order dated November 12, 1775, he gave directions for the foundation of a fort, presidio, and mission on the bay of San Francisco. On the 12th of June, 1776, an overland expedition left Monterey to

carry out the order of the viceroy. It was composed of the lieutenant commanding, Don José Moraga, one sergeant, sixteen soldiers, seven settlers—all married men with their families—and a number of other persons, as servants, herdsmen, and drovers, who drove the two hundred head of neat\* cattle for the presidio, and the pack train with provisions and necessary equipage for the road.<sup>1</sup> They arrived on the 27th of June. The rest of the equipment was sent from Monterey by sea in the vessel "San Carlos," which arrived on the 18th of August. The site of the presidio having been determined, several rude buildings were erected. These were a storehouse, a chapel, the commandant's dwelling, and dwellings for the soldiers and their families. The ceremony of taking formal possession followed on the 17th of September. Father Palou, one of the two priests who had been sent with the expedition to establish a mission at San Francisco, thus records the event in which he was a principal actor: "We took formal possession of the presidio on the seventeenth day of September, the anniversary of the impressions of the wounds of our Father San Francisco, the patron of the presidio and mission. I said the first mass, and after blessing the site, the elevation and adoration of the Holy Cross, and the conclusion of the service with the *Te Deum*, the officers took formal possession in the name of our sovereign, with many discharges of cannon, both on sea and land, and the musketry of the soldiers."<sup>2</sup> The seventeenth of September, 1776, may therefore be set down as the date of the foundation of San Francisco. The ceremonies attending the foundation of the mission at San Francisco were held on the 9th of the following October.

From this beginning grew the town or pueblo of San Francisco, which, like the pueblo of San Diego, Santa Barbara, or Monterey, was an off-shoot of a presidio. It is to be dis-

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<sup>1</sup> Palou, "Vida de Junipero serra," cap. xlv; also, Palou, "Noticias de la Nueva California," Parte Cuarta, cap. xviii.

<sup>2</sup> Palou, "Vida de Junipero Serra," cap. xlv.

tinguished from two other classes of pueblos, namely, those pueblos which were founded as such, and those which grew out of mission establishments. Vancouver has given a description of the presidio as it appeared in 1792, sixteen years after its foundation. "Its wall, which fronted the harbor, was visible from the ships; but instead of the city or town, whose lights we had so anxiously looked for on the night of our arrival, we were conducted into a spacious verdant plain, surrounded by hills on every side, excepting that which fronted the fort. The only object of human industry which presented itself was a square area, whose sides were about two hundred yards in length, inclosed by a mud wall, and resembling a pound for cattle. Above this wall the thatched roofs of their low, small houses just made their appearance. Their houses were all along the wall, within the square, and their fronts uniformly extended the same distance into the area, which is a clear, open space, without building, or other interruptions. The only entrance into it is by a large gateway; facing which, and against the center of the opposite wall or side, is the church; which, though small, was neat in comparison to the rest of the buildings. This projects further into the square than the houses, and is distinguishable from the other edifices by being white-washed with lime made from seashells; limestone or calcareous earth not having yet been discovered in the neighborhood. On the left of the church is the commandant's house, consisting, I believe, of two rooms and a closet, which are divided by massy walls, similar to that which incloses the square, and communicating with each other by very small doors. Between these apartments and the outward wall was an excellent poultry house and yard, which seemed pretty well stocked; and between the roof and the ceilings of the rooms was a kind of lumber garret: these were all the conveniences the habitation seemed calculated to afford. The rest of the houses, though smaller, were fashioned exactly after the same manner, and in the winter or rainy seasons must, at the best, be very uncomfortable dwellings. For, though the walls are



a sufficient security against the inclemency of the weather, yet the windows, which are cut in the front wall, and look into the square, are destitute of glass, or any other defense that does not at the same time exclude the light.

"The apartment in the commandant's house into which we were ushered was about thirty feet long, fourteen feet broad, and twelve feet high; and the other room or chamber I judged to be of the same dimensions, excepting in its length, which appeared to be somewhat less. The floor was of the native soil, raised about three feet from its original level, without being boarded, paved, or even reduced to an even surface; the roof was covered with flags and rushes, the walls on the inside had once been white-washed; the furniture consisted of a very sparing assortment of the most indispensable articles, of the rudest fashion, and of the meanest kind, and ill accorded with the ideas one had conceived of the sumptuous manner in which the Spaniards live on this side of the globe."<sup>1</sup>

The presidio was directly under military rule, and represented the military element in Spanish colonization: while the pueblo and the mission represented the civil and religious elements respectively. In the beginning, the officers of the presidio of San Francisco were a lieutenant and a sergeant, assisted by a corporal or corporals.<sup>2</sup> Lieutenant José Moraga was commandant until his death, in 1785, and Pablo Grijalva was sergeant until 1787. In the presidial settlements of Spanish America we observe the carrying out of the Roman, rather than of the British, system of colonization. The main

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<sup>1</sup>Vancouver, "A Voyage of Discovery to the North Pacific Ocean, and Round the World," III, 9-12; Hittell, I, 551, 583.

<sup>2</sup>De Mofras, writing of California between 1840 and 1842, sets down the annual cost of maintaining each presidio as about \$55,000. Out of this a lieutenant is paid \$550, a health officer, \$450, an ensign, \$400, a sergeant, \$265, a corporal, \$225, and seventy soldiers, \$217 each. Each soldier had seven horses and a mule, kept on the king's farm. Artillery men were furnished from the marine department of San Blas. "Exploration de l'Oregon et des Californies," I, 287.

function of the presidio was to furnish military protection to the missions, and to such pueblos as were established within the limits of its jurisdiction, either as independent settlements, or as an outgrowth of the presidio itself. The abolition of the presidios as military posts was not thought of, because no time was foreseen when the country would no longer need an armed force.

The missions, on the other hand, were designed as temporary establishments. "It was contemplated," says Judge Felch, "that in ten years from their first foundation they should cease. It was supposed that within that period of time the Indians would be sufficiently instructed in Christianity and the arts of civilized life, to assume the position and character of citizens; that these mission settlements would then become pueblos, and that the mission churches would become parish churches, organized like the other establishments of an ecclesiastical character, in other portions of the nation where no missions had ever existed. The whole missionary establishment was widely different from the ordinary ecclesiastical organizations of the nation. In it, the superintendence and charge was committed to priests, who were devoted to the special work of missions, and not to the ordinary clergy. The monks of the College of San Fernando and Zacatecas, in whose charge they were, were to be succeeded by the secular clergy of the National Church; the missionary field was to become a diocese, the president of the missions to give place to a bishop, the mission churches to become curacies, and the faithful in the vicinity of each parish to become the parish worshippers."<sup>1</sup> "The Spanish government," says Hittell, "had from the very beginning contemplated secularization by finally transforming the missions into pueblos; but the plan was based upon the idea of first educating the neophytes up to self-sustaining industry and citizenship."<sup>2</sup> The essentially

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<sup>1</sup>Opinion in the California Board of Land Commissioners, in the case of the Bishop of California's petition for the churches.

<sup>2</sup>"History of California," I, 507.

temporary character of the missions rendered it impossible for them to acquire full ownership in the lands which they used. These lands "were occupied by them only by permission, but were the property of the nation, and at all times subject to grant under the colonization laws."<sup>1</sup>

The towns or pueblos, however, were looked upon as permanent institutions. The earliest towns of California were organized under the laws of Philip II., which specified two forms of settlements that might participate in the rights of a pueblo: 1, that made by a person under a contract with the government; 2, that made by a number of private persons acting under a mutual agreement among themselves. The conditions of the contract between the founder of the settlement and the government were: "That within the period of time which may be assigned to him, he must have at least thirty settlers, each one provided with a house, ten breeding cows, four oxen, or two oxen and two steers, one brood mare, one breeding sow, twenty breeding ewes of the Castilian breed, and six hens and one cock." The contractor was, moreover, required to appoint a priest to administer the holy sacrament, and to provide the church with ornaments, and things necessary for divine worship. After the first appointment, the church was to be subject to royal patronage. Failure on the part of the contractor to comply with his obligation, would subject him to a loss of whatever he had "constructed, wrought, or governed," which would be applied to the royal patrimony, and he would, furthermore, incur the penalty of one thousand pounds of gold; but compliance with the terms of his obligation, would entitle him to four leagues of extent and territory in a square or prolonged form, according to the character of the land, in such manner that if surveyed there would be four leagues in a square. A final condition of this general grant was, that the limits of this territory should be distant at least five leagues from any

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<sup>1</sup>Howard, U. S. S. C. Rep., p. 540.

city, town, or village of Spaniards previously founded, and that there should be no prejudice to any Indian town or private person.<sup>1</sup> Regarding the second form of settlement, the law provided that when at least ten married men should agree to form a new settlement, there would be given them the amount of land before specified, and also "power to elect among themselves *alcaldes*, with the usual jurisdiction, and annual officers of the council."<sup>2</sup> And "when a *pueblo* was once established, no matter how or by whom composed, and officially and legally recognized as such, it came immediately within the provisions of the general laws relating to *pueblos*, and was entitled to all the rights and privileges, whether political, municipal, or of property, which the laws conferred upon such organizations or corporations;"<sup>3</sup> and "among these rights was the right to four square leagues of land, in the form of a square, or in such other form as might be permitted by the nature of the situation."<sup>4</sup> The possession of this land, however, was not dependent on a "formal written grant."<sup>5</sup> The situation of San Francisco made it impossible for the town to obtain four square leagues in a square. Its territory was "bounded upon three sides by water, and the fourth line was drawn for quantity, east and west, straight across the peninsula, from the ocean to the bay. The four square leagues (exclusive of the military reserve, church buildings, etc.) north of this line, constitute the municipal lands of the *pueblo* of San Francisco,"<sup>6</sup>

After the secularization of the mission at San Francisco,

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<sup>1</sup> "Recopilacion de Leyes de las Regnos de las Indias," Libro iv, Titulo v, Ley vi.

<sup>2</sup> "Recopilacion de Leyes de las Regnos de las Indias," Libro iv, Titulo v, Ley v.

<sup>3</sup> *Hart vs. Burnett*, Cal. Rep., 15, 541.

<sup>4</sup> *Stevenson vs. Burnett*, Cal. Rep., 35, 432.

<sup>5</sup> *Hart vs. Burnett*, Cal. Rep., 15, 542; *Stevenson vs. Burnett*, Cal. Rep., 35, 433.

<sup>6</sup> *Payne & Dewey vs. Treadwell*, Cal. Rep., 16, 230.



it was known sometimes as the "Pueblo de Dolores," but it had no separate municipal organization, and occupied the same legal position as some of the smaller "pueblos" of Mexico at the present time; it was embraced within a municipality of another name, to whose organization it was subordinated.<sup>1</sup>

Many of the fundamental provisions regarding the local government of California under the old régime are derived immediately from the Spanish constitution of 1812, and a decree of the Spanish Cortes of the same year. These laws provided for town governments, composed of *alcaldes*, councilmen, and *syndics*, to be elected by a system of indirect election. Towns having less than one thousand inhabitants were required, on some holiday in the month of December, to elect nine electors; those having more than one thousand and less than five thousand, to elect sixteen; and those having more than five thousand inhabitants, to elect twenty-five electors. The constitution specifies with respect to this primary election, simply, that the citizens of the city or town shall assemble annually in the month of December, and elect a certain number of electors. But the Spanish Cortes of May 23, 1812, in order to avoid difficulties that might arise in a large town, or where the population subject to the government was scattered over an extensive area, decreed that each parish might constitute an electoral district, and elect the number of electors to which its proportion of the total population would entitle it. Where several small towns were united under a single government, no collection of less than fifty inhabitants would have the privilege of nominating an elector; but if the number of parishes happened to be greater than the number of electors to be appointed, still, in spite of all other provisions, each parish would be entitled to one elector. These provisions were made to apply not only to towns whose inhabitants were in the enjoyment of the

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<sup>1</sup> "Derecho Politico de los Estados Unidos Mexicanos," II., 108.

rights of citizens, but also to those provincial towns whose inhabitants, owing to peculiar circumstances, might not possess these rights.

The electors having been elected, either by parishes or by the citizens, met in a common assembly; they were required to meet on some other holiday in the month of December, "to deliberate on the persons most suitable for the government of the town," and they were not allowed to adjourn without having completed the election: the number of officers to be elected varied with the populations of the towns. There were required for each town not exceeding two hundred inhabitants, one *alcalde*, two *regidores* or councilmen, and one *sindico procurador* or prosecuting attorney; for each town having more than two hundred and less than five hundred inhabitants, one *alcalde*, four *regidores*, and one *sindico*; for each town having between five hundred and one thousand inhabitants, one *alcalde*, six *regidores*, and one *sindico*; for each town having between one thousand and four thousand inhabitants, two *alcaldes*, eight *regidores*, and two *sindicos*; and twelve *regidores* for each town of more than four thousand inhabitants. In the capitals of the provinces twelve *regidores* at least were required, and, in case the town had more than ten thousand inhabitants, sixteen.

It was provided, moreover, that these officers should supersede all the municipal officers existing at the time of the adoption of the Constitution. The term of office for the *alcaldes* was one year; for the *regidores* or councilmen, two years, one-half going out of office each year; for the *syndicos*, one year, except in case there were two, when only one would be replaced each year. Qualifications for any of these offices were, that the person should be a citizen in the enjoyment of his rights, twenty-five years old, and a resident of the place for which he was elected for at least five years; also, that he should hold no public office by appointment of the king.

The duties of these officers are indicated in the Constitution, Articles 321–323, and are, in general, those which belong to

municipal governments everywhere. Under this Constitution, and the decree of the Spanish Cortes of May 23, 1812, there might be an ayuntamiento for a single town or pueblo, for a combination of several groups of inhabitants, each too small to have an ayuntamiento of its own, or for a pueblo to which were joined other such small groups of inhabitants. This law decreed by the Cortes survived the political revolution by which Mexico was severed from the mother country, and in many of its essential features it was continued as a law of Mexico till after California had fallen into the hands of the United States.

The Mexican Revolution of 1821 left the laws respecting private property within the ancient dominions of Spain in full force; and all titles to land that had been acquired before the revolution, whether by individuals, by a pueblo, or by any other corporation, remained valid under the Mexican republic. By the Mexican Colonization Laws of 1824 and 1828, such lands were expressly indicated as no longer within the field open to colonization.<sup>1</sup> Important changes, however, in the provisions for local government, were effected by the constitutional law of 1836, and the law of March 20, 1837, for the regulation of the interior government of the departments.<sup>2</sup> The Mexican Constitution of 1824 was a close copy of the Federal Constitution of the United States, and under it the several States enjoyed a large degree of independence. But in 1836 the political power of the nation became more thoroughly centralized, and the States and territories were reduced to departments, and made immediately subject to the supreme central government. Under this system Upper and Lower California became one department, which was divided into districts, and the districts into partidos. Over each district there was a prefect, and over each partido a subprefect; the former nominated by the governor of the department, and

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<sup>1</sup> Dwinelle, "The Colonial History of the City of San Francisco," 41.

<sup>2</sup> Dublan y Lozano, "Legislacion Mexicana," III, 230, 253, 323.

confirmed by the general government, the latter nominated by the prefect and approved by the governor. In so far as the Constitution of 1836 varied from the Spanish Constitution of 1812, regarding town governments, the change was a restriction of local authority. It provided ayuntamientos only for capitals of departments, for places where they had existed in the year 1808, for seaports of four thousand and pueblos of eight thousand inhabitants: and besides the previously existing qualifications for office, there was required an annual income of at least five hundred dollars. The number of alcaldes, regidores, and syndicos had previously been fixed by law with reference to the number of the inhabitants; it was now left to the determination of the departmental councils with the concurrence of the governor; with, however, the provision that the first should not exceed six, the second, twelve, and the last, two. Vacancies, through death or inability to serve, were filled by a meeting of the electoral college called for that purpose; but vacancies which occurred within three months of the end of the year were filled at the annual election. If the ayuntamiento, or any part of it, were suspended, that of the preceding year, or the corresponding part of it, was required to act. Among those excluded from membership in the ayuntamiento were officers appointed by the congress, by the general government, or by the government of the department; the magistrates of the supreme tribunals of the departments; judges of first instance; ecclesiastics; persons in charge of hospitals, houses of refuge, or other establishments of public charity. These excluded classes, however, did not embrace appointees of the general or departmental government not domiciled in the place of official destination, nor retired soldiers resident in the territory of the respective ayuntamiento, and not supported exclusively by means of pensions.

Under these laws the ayuntamiento was subordinated to the sub-prefect of the partido in which its pueblo lay, and through the sub-prefect to the prefect of the district and to



the governor of the department. Its functions were the care of the public health and accommodation, to watch over prisons, hospitals, and benevolent institutions that were not of private foundation, primary schools sustained by public funds, the construction and repair of bridges, highways, and roads, the raising and expenditure of public moneys from taxes, licenses, and the rents of municipal property; to promote the advancement of agriculture, industry, and commerce, and to assist the alcaldes in the preservation of peace and public order among the inhabitants.<sup>1</sup>

The alcaldes were required to maintain good order and public tranquillity; to watch over the execution and fulfilment of the police regulations, and of the laws, decrees, and orders communicated to them by the sub-prefects, or by the prefects in want of the sub-prefects; to ask from the military commanders the armed force which they might need, or to organize the citizens for their own defense; to secure the arrest and trial of the offenders; to see that the citizens subsist by useful occupations, and to reprehend idlers, vagrants, persons without any fixed place of abode, or any known employment; to impose executively a fine to the amount of twenty-five dollars on all disturbers of the peace, or to condemn them for four days to the public works, or to cause them to be arrested for double that period; governing themselves according to the circumstances of the individuals, and giving them a hearing summarily and verbally if they demanded it; but with respect to offenses which have a penalty affixed to them by law, the legal dispositions remaining in force were to be observed. The alcaldes, moreover, assisted and voted at the sessions of the ayuntamiento, and presided over them in the order of their appointment, when neither the prefect nor sub-prefect was present, the presiding alcalde deciding in the case of a tie vote. Temporary vacancies in the office of alcalde were filled by the regidores in the order of their election.<sup>2</sup>

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<sup>1</sup> Constitution of 1836, Part VI, Art. 25.

<sup>2</sup> Law of March 20, 1837, Arts. 166-176.

The immediate government of towns deprived of ayuntamientos by the legislation of 1836 and 1837 was to be in the hands of justices of the peace, the number for each town being fixed by the departmental council, with the concurrence of the governor. They were to be appointed by the prefect of the district, on the recommendation of the respective sub-prefect. It was required that they should be Mexican citizens over twenty-five years of age, and residents of the towns for which they were appointed. In every place of at least a thousand inhabitants, the justices of the peace, in subjection to the sub-prefect, and through him to the superior authorities, had essentially the same powers and obligations as the ayuntamientos; and these justices of the peace, as well as those of places with less than a thousand inhabitants, had, moreover, the powers and obligations conferred by this law upon the *alcaldes*.<sup>1</sup>

Prior to 1834, there had been no ayuntamiento or common council at San Francisco. Captain Benjamin Morell, who visited the town in 1825, described it as "built in the same manner as Monterey, but much smaller, comprising only about one hundred and twenty houses and a church, with perhaps five hundred inhabitants." This estimate was probably largely in excess of the real number at that time;<sup>2</sup> for the census made in 1842 gives one hundred and ninety-six as the total population of the town at this date, seventeen years after Captain Morell's visit; and in June, 1847, it amounted to only four hundred and fifty-nine, three hundred and twenty-one of whom were males, and one hundred and thirty-eight females.

The government of this town or pueblo, before 1834, was in the hands of the territorial governor and the military commandant of the presidio. The former imposed license fees, and taxes, and the latter acted as a judge of first instance. Finally, in November of this year, the territorial governor,

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<sup>1</sup> Law of March 20, 1837, Arts. 177-191.

<sup>2</sup> Dwinelle's "Colonial History," 41.

José Figueroa, wrote to the military commandant of San Francisco, stating that the territorial council had ordered the partido of San Francisco, which "embraced all Contra Costa, Sonoma, San Rafael, and, on this side of the bay, the whole of the present county of San Francisco,"<sup>1</sup> to proceed to the election of a constitutional ayuntamiento, which should reside in the presidio of that name, and be composed of an alcalde, two regidores, and a syndico, in accordance with the existing laws. It was ordered, moreover, that an account of the election should "be given by the proper way to the supreme government for the due approbation." By the same communication the commandant was informed that the ayuntamiento, when installed, would exercise the political functions with which he had been charged; and the alcalde, the judicial functions which the laws, in lieu of a proper judge, had conferred upon him. The commandant was to be confined strictly to the functions of his military command.<sup>2</sup> It was proposed by this order to separate the military and civil power, and to bestow the latter upon a local organization. It was a "change of the former military government, which the commandant of the presidio had exercised, into a civil government for the same district."<sup>3</sup> This local government was what has been called an ayuntamiento aggregate, and was formed "for the purpose of giving a municipal government to those small populations of the partido which would not otherwise have an ayuntamiento."<sup>4</sup> It embraced under its jurisdiction, as already suggested, not only the inhabitants of the peninsula, but also those of the other side of the bay.<sup>5</sup>

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<sup>1</sup>"Documents, Depositions, and Brief of Law Points raised thereon on behalf of the United States, before the U. S. Board of Land Commissioners." San Francisco, 1854, p. 67.

<sup>2</sup>Figueroa to the Military Commandant of San Francisco, Monterey, November 4, 1834. See Dwinelle, Addenda, No. xxi.

<sup>3</sup>"Documents, Depositions, and Brief," p. 67.

<sup>4</sup>Dwinelle's "Colonial History," 48.

<sup>5</sup>Governor José Figueroa wrote from Monterey, January 31, 1835, to the alcalde of San Francisco, as follows: "The appointment you have

As to the significance of this change, the opinion of the majority of the United States Land Commission for California is unequivocal: "After a careful examination of the whole testimony on this point, and the law applicable to the subject, we are brought to the conclusion that the effect of the proceedings of the territorial authorities in 1834, as shown by the official records and documents for the establishment of the ayuntamiento at the presidio of San Francisco, and the subsequent organization of that body in conformity therewith, was to erect the presidio into a pueblo or town, with all the civil and territorial rights which attached to such corporations under the Mexican laws then in force."<sup>1</sup>

The meeting for the election of electors, the *junta primaria*, was held on the first Sunday in December, 1834. On the third Sunday of the same month the electors chose the members of the ayuntamiento, which was installed January 1, 1835. The election was held at the house of the commandant of the presidio, and the voters came from the several places already indicated as embraced within the jurisdiction of the partido. Their eagerness to participate in the election is explained by their anxiety to get rid of the military authority. After the organization of the ayuntamiento, the records or archives were kept in a desk in one of the rooms at the presidio, where the meetings were held. But the place of meeting, whether at the presidio, the mission, or the village of Yerba Buena, is not a matter of importance, since all were within the limits of a common jurisdiction.

Not long after this organization of the partido was effected, the government concluded, from a census of the town, that, under the law of May 23, 1812, which was still considered to be in force, San Francisco itself was entitled to an ayunta-

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made in favor of the citizen Gregorio Briones, as auxiliary alcalde in Contra Costa, seems to be very well, and consequently has my approval. I say this to you in answer to your official note on the matter, of the 22d ultimo."

<sup>1</sup> City of San Francisco vs. The United States.



miento, and therefore ordered the commandant to cause to be elected one *alcalde*, two *regidores*, and one *syndico*; in other words, the officers prescribed by law for towns of more than fifty, and less than two hundred inhabitants. The census which was the basis of this conclusion probably included not only the population at the *Presidio*<sup>1</sup> and the Mission, but also that at other points on the northern part of the peninsula. San Francisco appears not to have been specifically the *Presidio*, the Mission, or Yerba Buena, but to have comprehended them all; for during seven years after the establishment of the government of San Francisco, the offices of this government were at different times indifferently at the *Presidio*, at the Mission, and at Yerba Buena, and still it remained throughout the government of San Francisco.

In accordance with the governor's order, addressed to the commandant, a primary election of nine electors was held December 13, 1835. This election, like the first, was held at the house of the commandant. On the 27th of the same month, the electors met for the purpose of electing one *alcalde* and the other officers; and thus was constituted the first *ayuntamiento* of the *pueblo* of San Francisco, which superseded the *ayuntamiento* of the *partido*. Of this government, Dwinnelle says: "Instead of being an aggregated *ayuntamiento*, composed of small populations in the *partido*, it was an *ayuntamiento* of the *pueblo*, to which various small populations of the *partido* were aggregated;"<sup>2</sup> or, as he has elsewhere styled it, a composite *ayuntamiento*. The town government thus established was endowed with those powers which, under the Spanish laws of 1812, belonged to the fully organized

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<sup>1</sup> According to Francisco Sanchez, who was the commandant at the *Presidio* in 1838, the only persons residing here at this time were Candelario Miranda, Joaquin Pina, and Eusebio Soto. Pina was a corporal of artillery, and Soto was a private. Antonio Soto and Apolonario Miranda lived on lots near the *Presidio*, at the left of the road going from Yerba Buena to the *Presidio*.

<sup>2</sup> "Col. Hist.," 51.

pueblo, and it was continued in existence by virtue of these laws.

When, however, the Constitution of 1836 came into operation in California, it led to important changes in municipal affairs. Except capitals of departments and places which were regarded as pueblos before 1808, no town of less than four thousand inhabitants was permitted to have an ayuntamiento. Under this law, the government which had been set up at San Francisco in 1835 was abolished. The ayuntamiento elected January 8, 1838, appears to have been the last one constituted in this town before the Constitution of 1836, as supplemented by the law of March 20, 1837, came into full operation. In his message of February 16, 1840, the governor announced that "there is no ayuntamiento whatever in the department; for, there being no competent number of inhabitants in any of the towns, as provided by the constitution, those then existing had to be dissolved; and only in the capital there ought to be one of such bodies."<sup>1</sup> Having, then, documentary evidence of the election of an ayuntamiento, on January 8, 1838, and the statement of the governor that no ayuntamiento existed here in February, 1840, it is clear that it must have ceased to exist at some point between these two dates. The government then passed into the hands of justices of the peace, who were provided, in towns of less than four thousand inhabitants, with the powers and functions of alcaldes and ayuntamientos.

It is not to be supposed that the people of San Francisco, in electing an ayuntamiento, in January, 1838, were acting in conscious violation of a law which deprived them of this privilege. Their action is rather to be explained by the fact that, although the constitution was promulgated at the end of 1836, and the supplementary law regarding the internal government of the departments was passed the following March, no information of these events had reached San Francisco

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<sup>1</sup> Dwinelle, "Col. Hist.," Addenda, No. I, p. 70.

prior to the date of this last election. That delay like this was not unusual, may be seen from the fact that certain election laws, passed by the supreme government November 30, 1836, were not received and proclaimed in California till January, 1839, and also from the statement of De Mofras, that "official despatches were often a year in the passage between California and Mexico."<sup>1</sup>

Although San Francisco was, at this time, deprived of its council, it did not relinquish its character as a pueblo. "Accordingly, we find that when the pueblo of San Francisco, after the American conquest of California, attained the requisite population, it again elected its ayuntamiento, not under any provisions of the laws of the conquerors, but under these very provisions of the Mexican constitution of 1836, under which the ayuntamiento of the pueblo was suspended in 1839."<sup>2</sup>

In 1839, San Francisco had been founded more than sixty years; still it was without a jail, from which it is to be inferred that but little progress had been made in civilization. Finding the criminal Galindo on their hands, the inhabitants of San Francisco, through Justice De Haro, asked of the governor that he might be sent to San José, which was already provided with a prison. Besides the lack of a jail, another reason for the request was that the inhabitants of the place were scattered, each having his agricultural and stock interests at a great distance from the town, so that there were very few remaining to guard the criminal, and these could not spare the time from their personal business.

The law under which the governmental power of San Francisco was transferred to justices of the peace, made no provision in towns not entitled to have ayuntamientos for a syndico, or an officer known as *sindico procurador*; yet, on July 20, 1839, Francisco Guerrero, justice of the peace at San

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<sup>1</sup> Vol. I, p. 222. See Hittell, I, 542.

<sup>2</sup> Dwinelle, "Col. Hist.," 64.

Francisco, proposed to the prefect of the first district to appoint Don Juan Fuller as a *sindico procurador* for this place, "for the better management of the municipal rents." Fuller appears to have been appointed, for there exists an account made out by Don Juan Fuller as *sindico* of the municipality of San Francisco, embracing the period between August, 1839, and January, 1842. This office was continued to the last year of Mexican dominion. In order to relieve the justices of the peace, and to enable them to devote themselves to the duties peculiar to their office, Governor Micheltorena, on November 14, 1843, ordered the election of two *alcaldes* in San Francisco, and in each of several other towns of the department. By this order it was required that the election should be indirect; that seven electors should be chosen on the second Sunday of December, who should meet on the following Friday to elect the *alcaldes*. The newly elected officers were required to go into office on the 1st day of January, 1844, the first *alcaldes* to perform the duties of judges of first instance, and to take charge of the prefectures of the respective districts. The first *alcalde* appointed by this election was Guillermo Hinckley. The election of the following December resulted in the appointment of Juan N. Padilla, who took the customary oath, and entered upon the duties of his office January 1, 1845. On July 7, 1846, that portion of California which embraces San Francisco passed under the dominion of the United States.

Foreseeing the outbreak of hostilities between Mexico and the United States, George Bancroft, Secretary of the Navy, under date of June 24, 1845, sent a secret and confidential communication to Commodore John D. Sloat, then in command of the United States naval forces in the Pacific, and called his attention particularly to the existing relations between this country and Mexico. "It is the earnest desire of the President," he wrote, "to pursue the policy of peace; and he is anxious that you, and every part of your squadron, should be assiduously careful to avoid any act which could be



construed as an act of aggression. Should Mexico, however, be resolutely bent on hostilities, you will be mindful to protect the persons and interests of citizens of the United States near your station; and should you ascertain, beyond a doubt, that the Mexican government has declared war against us, you will at once employ the force under your command to the best advantage. The Mexican ports on the Pacific are said to be open and defenseless. If you ascertain with certainty that Mexico has declared war against the United States, you will at once possess yourself of the port of San Francisco, and blockade or occupy such other ports as your force may permit. Yet, even if you should find yourself called upon, by the certainty of an express declaration of war against the United States, to occupy San Francisco and other Mexican ports, you will be careful to preserve, if possible, the most friendly relations with the inhabitants, and where you can do so, you will encourage them to adopt a course of neutrality." In a subsequent order to Commodore Sloat, issued after the beginning of hostilities, the Secretary wrote: "You will consider the most important object to be, to take and to hold possession of San Francisco; and this you will do without fail."<sup>1</sup> The occasion for acting under these orders came in 1846. Having received at Mazatlan the information that the Mexican troops had, by order of the Mexican government, invaded the territory of the United States, and attacked the forces under General Taylor, Commodore Sloat sailed on the 8th of June, in the "Savannah," for the coast of California, to execute the order of June 24, 1845. They arrived at Monterey July 2, 1846, and on the 7th of the same month took possession of the town, raised the standard of the Union, and issued to the inhabitants of California a proclamation announcing the designs of the government of the United States, at the same time pointing out the grounds of hope for the people under the new rule. In order that the

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<sup>1</sup>Geo. Bancroft to Com. John D. Sloat, May 15, 1846.

public tranquillity might not be disturbed, the judges, alcaldes and other civil officers were invited to execute their functions as heretofore; at least, until more definite arrangements could be made for the government of the territory. Assurance was, moreover, given that "all persons holding titles to real estate, or in quiet possession of land under color of right," should have those titles guaranteed to them; and that "all churches and the property they contain, in possession of the clergy of California," should continue in their existing rights and possessions.

In the meantime, the "Portsmouth" was at San Francisco awaiting orders, which were received by Commodore Montgomery on the evening of July 8. At 7 o'clock the following morning, he hoisted the American flag at San Francisco, issued Commodore Sloat's proclamation, and took possession of the region in the name of the United States.

The result of these events, when confirmed by the peace between Mexico and the United States, was to transfer the sovereign power over this region from the Mexican government to the government of the United States; but the existing laws and machinery of local government were temporarily maintained, and Lieutenant Washington A. Bartlett was appointed by Montgomery as the first alcalde of San Francisco under the new regime.

## II.

The law of 1836, by which San Francisco was deprived of its ayuntamiento in 1839, left the governmental power of the municipality in the hands of justices of the peace. But when California passed under the dominion of the United States, the most important officer in the municipal government of San Francisco was the alcalde. This change had been effected by the order of Governor Micheltorena, in 1843, acting "with the extraordinary powers conferred on him by the President

under the Basis of Tacubaya.”<sup>1</sup> Monterey and Los Angeles were required to elect ayuntamientos, each composed of two alcaldes, four regidores, and one sindico. The other towns were required to elect “two alcaldes of first and second nomination.” “They were to enter upon their duties the first of the following January, and in addition to the judicial powers of the ordinary alcaldes and the political powers of the prefects, they were to exercise the powers and obligations which the ayuntamientos have.”<sup>2</sup>

Under the Mexican régime alcaldes possessed the powers and jurisdiction of judges of first instance, and it is believed that no other judges of first instance were appointed or held office in California at this time.<sup>3</sup> The alcaldes, to a great extent, both made and enforced the law; “at least, they paid but little regard either to American or Mexican law further than suited their own convenience, and conduced to their own profit.”<sup>4</sup> The alcalde, as well as the justice of the peace, usually exercised judicial, but sometimes political, functions.<sup>5</sup> His judicial functions were relatively prominent when his office existed in union with an ayuntamiento. The writers of the “Annals of San Francisco,” speaking evidently from the experience of their own city, assign to the alcalde the entire

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<sup>1</sup> Cal. Rep., iii, 449.

<sup>2</sup> Cal. Rep., 15, 558.

<sup>3</sup> “By the articles 26, 27, and 28 of a decree made on the second day of March, 1843, alcaldes and justices of the peace in the departments of California, New Mexico, and Tabasco, were empowered to perform the functions of Judges of First Instance in those districts in which there were no judges of first instance.” “There was no Judge of First Instance in the district of San Francisco.” Cal. Rep., i, 220, 508.

<sup>4</sup> Cal. Rep., i, Pref. vii.

<sup>5</sup> Dwinelle, v. Bondelier, in his “Tour in Mexico,” speaks of a military function which the alcalde also exercised: “Still there existed, as late as 1587, a war-captain (capitan de la guerra) of Cholula. That officer was at the same time Alcalde (Justice). It is probable that, under the influence of two centuries of constant peace, the latter office prevailed, and the war-captain completely disappears.” p. 154.

control of the municipal affairs, and an administration of justice "pretty much according to his own ideas of the subject; without being tied down to precedents and formal principles of law."<sup>1</sup> A contemporary account of the functions of the alcalde, published in *The California Star*, April 17, 1847, agrees essentially with the foregoing. "There being no law defining the powers and duties of the alcaldes, it is impossible for them to know of what subjects they have cognizance, or over what extent of country they have jurisdiction. By some, who pretend to be well versed in the invisible laws of California, it is insisted that the jurisdiction of the alcaldes extends to no matters of difference where the amount in controversy exceeds one hundred dollars, and that each is confined to his particular district, in his judicial acts. Others urge, that as to amount their jurisdiction is unlimited, and that the alcaldes who resided at the principal towns, have both appellate and original jurisdiction throughout the entire department in which they reside." A specific limitation, however, was set to the alcalde's power by Mason's circular, dated at Monterey, August 23, 1847. By this the alcalde was forbidden to perform the marriage ceremony where either of the parties was a member of the Catholic Church in California, the object of this limitation being "to secure to the Californians the full enjoyment of their religion and religious privileges." But in spite of such limitations, there remained abundant ground of dissatisfaction. The grievances frequently found expression in *The California Star*. "When California was taken possession of," it was said editorially on June 19, 1847, "it was the duty of our rulers to have continued in existence the laws of Mexico; this was proclaimed

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<sup>1</sup>"The Annals of San Francisco." By Frank Soulé, John H. Gihon, and James Nisbet. 179. In a conversation between Wilkes and Don Pedro, alcalde of San José, Wilkes asked the alcalde "by which law he administered justice; his answer was—by what he thought right." Wilkes, "Expedition," v. 208.



by Commodore Stockton, but never put in operation. For example, one of the laws of the Republic is, that there shall be an *alcalde's* court established in each particular neighborhood, a district court in each of the three districts, to which appeals may be taken from the *alcaldes*, and a court of appeals at Monterey, to which appeals may be taken from the district courts. This law has been annulled, and instead of this organization, we have *alcaldes* all over the country, who claim original and ultimate jurisdiction over all matters of difference between citizens, of whatever amount, and if either party feels dissatisfied with their decisions, he goes in person to the governor, makes an *ex parte* statement of the case, and obtains a stay of proceedings, or reversal of the judgment, as the will of the military commandant may dictate. Or, if a culprit be sentenced to hard labor, or imprisonment, and is sent to Monterey for punishment, to the Rev. Puissant-Coke, *alcalde* of that renowned burg, he dismisses him to the field of his former crimes, with the godly admonition, 'Go, and sin no more.' The thief pays his fee and re-enters upon the duties of his profession."

Under Spanish and Mexican laws, it was provided that the *alcalde*, in all cases of a civil nature, which might be terminated by an agreement of the parties, should "require conciliatory measures to be tried until they should result either in a satisfactory arrangement or in the entire failure to accomplish a reconciliation."<sup>1</sup> One of the *alcalde's* most important functions is, therefore, to act as mediator between parties in dispute. Cases which may come under the jurisdiction of the judge of the district shall be presented to the competent *alcalde*, who, with two good men, one nominated by each party, shall hear them both, take account of their affirmations, and, having heard the opinions of the two associates, shall within eight days at the most announce the terms of conciliation which appear to him proper to terminate the

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<sup>1</sup> Cal. Rep., i, 60, 61.

litigation without further progress. If the parties acquiesce in this judgment, the case is thereby ended, and the result is noted in a book.

The four years between the appointment of Lieutenant Bartlett to be the first alcalde of San Francisco, under the authority of the United States, and the adoption of the first charter under the constitution of California, constitute a period of transition, a period in which the city was seeking a foundation for its government. Mr. Bartlett held the office of alcalde from July 9, 1846, to February 22, 1847, but during about a month of this time, subsequent to the 20th of December, he was a prisoner in the hands of the Mexican Californians; and during his absence George Hyde, by the appointment of Captain J. B. Hull, performed the duties of the office. Mr. Bartlett resigned in order to return to his naval duties, and after his resignation General Kearney appointed Edwin Bryant as his successor.

A short time before he resigned, Mr. Bartlett was publicly charged by C. E. Pickett with misappropriating funds belonging to the town. In reply to this charge, he demanded of Capt. J. B. Hull, then commanding the Northern District of California, that a commission of inquiry should examine into the state of the accounts of his office.<sup>1</sup> In accordance with this request, Captain Hull appointed W. D. M. Howard, William A. Leidesdorff, and Francisco Guerrero a committee to make the investigation, "with a view to ascertain, whether any of the funds of the office have been applied to any object, other than the proper expenses belonging to it, and if so, what amount, and by whose authority, and also, whether there is a deficiency in the funds, not properly accounted for."<sup>2</sup> The result of this examination was embodied in the com-

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<sup>1</sup> Washington A. Bartlett to Joseph B. Hull, July 12, 1847. See *The California Star*, January 23, 1847.

Joseph B. Hull to Howard, Leidesdorff, and Guerrero, January 15, 1847. See *The California Star*, January 23, 1847.

mittee's report completely exonerating the alcalde from the charge of misapplying the funds of his office. Mr. Bartlett was, therefore, directed by Captain Hull to resume the duties of alcalde, which in the meantime had been performed by Mr. Hyde.<sup>1</sup> The report of this commission is also important as showing the actual receipts of the municipal funds from the 15th of August to the 11th of December, 1846, which amounted to five hundred dollars and twenty-five cents (\$500.25), besides a port fund of two hundred and forty-six dollars and seventy-five cents (\$246.75). The principal source of this revenue was the business transacted in the alcalde's office. Another source was an annual license fee of ten dollars for the sale of liquors, and a small amount was also "received on account of lots unoccupied or taken up in Yerba Buena."<sup>2</sup>

Mr. Bryant remained in office only till the first of June, 1847, when he resigned; but he appears to have remained long enough to gain the good opinion of his fellow-citizens. George Hyde was appointed by General Kearney to succeed Mr. Bryant. During his period of office, Mr. Hyde found that the business of the local government had increased to such an extent that its proper management was beyond his unaided ability; he therefore, on the 28th of July, selected six gentlemen to assist him. These were William A. Leidesdorff, Robert A. Parker, José P. Thompson, Pedro T. Sherreback, John Rose, and Benjamin R. Buckalew. They were called the ayuntamiento, or town council, although not constituted in the manner provided by law for establishing that body. They were to remain in office until superseded by members elected under an order by the governor. An ordinance providing for such an election was issued by Governor

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<sup>1</sup>J. B. Hull to W. A. Bartlett, January 18, 1847. See *The California Star*, January 23, 1847.

<sup>2</sup>The report was dated January 16, 1847, and was printed in *The California Star*, January 30, 1847.

Mason on the 15th of August. It cites the need of a more efficient government, and indicates the principal features of that about to be established. "There is wanted," he says, "in San Francisco<sup>1</sup> an efficient town government, more so than is in the power of an alcalde to put in force. There may be soon expected a large number of whalers in your bay, and a large increase of your population by the arrival of immigrants. It is therefore highly necessary that you should at an early day have an efficient town police, proper town laws, town officers, etc., for enforcement of the laws, for the preservation of order, and for the proper protection of persons and property.

"I therefore desire that you call a town meeting for the election of six persons, who, when elected, shall constitute the town council, and who, in conjunction with the alcalde, shall constitute the town authorities until the end of the year 1848.

"All the municipal laws and regulations will be framed by the council, but executed by the alcalde in his judicial capacity as at present.

"The first alcalde will preside at all meetings of the council, but shall have no vote, except in cases where the votes are equally divided.

"The town council (not less than four of whom shall constitute a quorum for the transaction of business) shall appoint all the town officers, such as treasurer, constables, watchmen, etc., and determine their pay, fees, etc.

"The treasurer shall enter into ample and sufficient bonds, conditioned for the faithful performance of his duties; the bonds to be fully executed to the satisfaction of the council before the treasurer enters upon his duties.

"The second alcalde shall, in case of the absence of the first alcalde, take his place and preside at the council, and there perform all the proper functions of the first alcalde.

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<sup>1</sup>This name supersedes that of Yerba Buena in accordance with Bartlett's order of March, 1847.



“No soldier, sailor or marine, nor any person who is not a *bonâ fide* resident of the town shall be allowed to vote for a member of the town council.”

Under this order, the alcalde, Mr. Hyde gave notice on the 30th of August, 1847, that there would be an election for six members of a town council for San Francisco, and that this election would be held at the alcalde's office on Monday, the 13th of September. In this notice it was ordered that the polls should be open from 12 to 2 o'clock, but later the time was extended so that the polls might remain open from 10 A. M. to 4 P. M. According to the governor's order, voting was to be confined to "*bonâ fide* residents of the town"; but it was found to be somewhat difficult to determine the exact limits of this definition. Of the population of the town at the time there exists no accurate account. In June, however, it was set down at four hundred and fifty-nine, of whom three hundred and twenty-one were males, and one hundred and thirty-eight females. But more than one hundred of the males were under twenty-one years of age, leaving somewhat over two hundred persons entitled by age and sex to vote. When the vote had been taken, it was found that precisely two hundred ballots had been cast for more than thirty different candidates. There appears to have been no efficient system of nomination, and in counting the vote the six persons who had received the highest numbers were declared elected. These were: William Glover, with 126 votes; W. D. M. Howard, with 114 votes; W. A. Leidesdorff, with 109 votes; E. P. Jones, with 88 votes; Robt. A. Parker, with 74 votes; and W. S. Clark, with 72 votes.

At the first meeting of this council, held September 16, 1847, W. A. Leidesdorff was elected town treasurer, and it was agreed that the clerk of the alcalde's office should act as secretary of the council, and for his services receive a suitable compensation. Messrs. Howard, Jones, and Clark were constituted a committee "to form a code of laws for the regulation of the affairs of the town." The result of their work was

presented at the next meeting, held September 21, in the form of a body of rules for the government of the council. These rules being adopted, provided that the regular meetings of the council should be held on Monday evening, at seven o'clock, of each week until a different time should be agreed upon by a majority of all the members. Every motion, resolution, or other proposition was required to be put in writing and distinctly read, before any discussion on it would be allowed. After sufficient deliberation, the vote should be taken by the *alcalde viva voce*. The *alcalde* should decide all questions of order, from whose decision an appeal might be taken to the members present, in which case a majority deciding against the *alcalde*, his decision should be reversed. The *alcalde's* connection with the council was merely that of a presiding officer empowered to give "a casting vote in case of a tie." He could "not participate in the discussion of any subject, or give an opinion thereon." Any two members might call a meeting of the council at any time, provided that at least twelve hours previous notice were given by the secretary in writing.

At this meeting there was also adopted an ordinance making each member of the council a "conservator of the peace within the limits of the town." He might issue any process necessary to preserve the peace and morals of the place, upon application or when he might deem it proper to do so. Such process was made returnable to the *alcalde*, and was to "be charged and regarded by the *alcalde* as if it had been issued by himself."

Not long after its organization, the council resolved itself into a "committee of the whole to wait upon the governor to learn his views upon the duties of the council."<sup>1</sup> In reply to this request, Governor Mason wrote "that the jurisdiction of the present town council of San Francisco is confined to the limits of the town survey, the boundaries of which I have instructed the *alcalde* to have marked as soon as convenient."

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<sup>1</sup> *The Californian*, September 29, 1847.

On a second point, he informs them that the duties of the council were prospective, not retrospective, that they could "not impair the obligation of contracts entered into by the previous town authorities, nor take jurisdiction of the actions or conduct of such authorities, further than to modify or repeal any law or ordinance created by the previous government and now in force which they might deem inconsistent with the interest of the community."<sup>1</sup> In this communication the governor strongly recommended that whatever expenses might be contemplated, "the town be kept perfectly free of debt."

Mr. Hyde had never been a popular magistrate. Frequent charges against him found their way to the public, and the governor had been several times petitioned to remove him. Finally, in this letter to the council, he authorizes that body to make a thorough investigation of these charges, and report to him the facts, together with their opinion. This action of the governor gave general satisfaction, but of the nine charges made against the alcalde, the investigation resulted in establishing only two, and these were not deemed by the governor adequate ground for removal from office. But the indignant populace demanded their victim, and Mr. Hyde saw fit to resign April 3, 1848. During the administration of Mr. Hyde Governor Mason had appointed T. M. Leavenworth to the office of second alcalde of San Francisco, and now on the resignation of the first alcalde, Mr. John Townsend was appointed to fill the vacancy.

By an ordinance passed September 28, 1847, the chief police force of the town was made to consist of two elected constables, who should "perform all duties required of other ministerial officers within the town, who should faithfully execute all processes directed to them in accordance with law, and make due returns thereof," and who should "strictly enforce and obey every law, ordinance and resolution passed by the coun-

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<sup>1</sup>R. B. Mason to the Town Council, Elect. of San Francisco, October 1, 1847. See *The Californian*, October 6, 1847.

eil." The constables were to "receive for the service of any writ or other process, one dollar, to be paid out of the fines imposed upon cases, one dollar for the service of any writ or other process, to be paid by the defeated party, also ten cents per mile for every mile which they might travel to serve any writ or other process beyond the limits of the town."<sup>1</sup>

While San Francisco was thus making progress towards a well-ordered local government, it was suddenly stricken as with a plague.<sup>2</sup> On the 19th of January, 1848, gold was discovered on the north fork of the American river. It required several weeks to spread the news of the discovery, and still longer to convince the unsuspecting inhabitants that a vast treasure had been revealed. But when the real significance of the revelation dawned on the public mind, it produced a wild frenzy of desire to participate in the harvest of gold. San Francisco, which had already become the leading town of the territory, was a scene of sudden desolation. Its houses were left unoccupied and unprotected; its former trade ceased; its lots fell to a small part of their earlier value; its two newspapers, *The Californian* and *The California Star*,<sup>3</sup> were suspended in May and June; and the town, deserted by the bulk of its inhabitants, was at one time without a single officer clothed with civil authority. It is asserted, moreover, that at one time only five men were left in the town. But when the news had spread to the other side of the country, and to other lands, and the Argonauts began to find their way through the Golden Gate, the opportunities of trade at San Francisco brought the town once more into active existence.

In the beginning of October, 1848, the town had so far revived as to be able to hold an election. Dr. T. M. Leaven-

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<sup>1</sup> See *The Californian*, October 6, 1847.

<sup>2</sup> "Master and man alike hurried to the *placers*, leaving San Francisco, like a place where the plague reigns, forsaken by its old inhabitants, a melancholy solitude." *Annals*, 204.

<sup>3</sup> *The Californian* was suspended May 29, 1848; and *The California Star* June 14, 1848. *The Californian* was revived on the 15th of July.



worth was a second time chosen first alcalde, and B. R. Buckalew and Barton Mowrey were elected town councillors. At this election one hundred and fifty-eight votes were polled. On the 9th of October, the town council met for the first time since May, and adjourned to the 11th, when the limits of the town for the administration of justice were defined. The boundary as given in the resolution was: "That the line shall commence at the mouth of Creek Guadalupe, where it empties into the Bay of San Francisco, following the course of said stream to its head waters; from thence a due west line to the Pacific Ocean; thence northwards along the coast to the inlet to the harbor of the bay; thence eastwardly, through the middle of the said inlet into the Bay of San Francisco, and embracing the entire anchorage ground from the inlet to the mouth of the Creek Guadalupe."<sup>1</sup>

In accordance with Mason's order the first elected town council was to remain in power until the end of the year 1848. On the 27th of December, the town council for 1849 was elected, the number of votes cast being three hundred and forty-seven. The members elected were Stephen C. Harris, W. D. M. Howard, George C. Hubbard, Robert A. Parker, Thomas J. Roach, John Sirrine, and John Townsend. The old town council of 1848 was opposed to the continuance of the new one, because a certain number of unqualified persons had voted at the election, and therefore ordered a new election. On the 15th of January, 1849, another town council was consequently elected, composed of Stephen C. Harris, Lazarus Everhart, Stephen A. Wright, Daniel Storks, Isaac Montgomery, John Sirrine, and C. E. Wetmore, two of the members being common to this and the council elected in December. There were thus three town councils claiming an authoritative existence. That elected in December denied entirely the right of the old council to further power, while that in turn acknowledged the town

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<sup>1</sup>"Annals," 207.

council elected in January, and proposed to transfer to it the municipal records.

The confusion which was here manifest in the local affairs of San Francisco, was only an index of the attitude into which the inhabitants of California had everywhere fallen. They appeared to be without any recognized political status. They believed that they could not safely wait for Congress to give them a government, and therefore determined to form one for themselves. "Accordingly, attempts were soon severally made by the people of San Francisco, Sonoma, and Sacramento, to form legislatures for themselves, which they invested with supreme authority. Other portions of the country prepared to follow the example of the places named."<sup>1</sup> At San Francisco, in answer to a previous call, the citizens of the town and district held a meeting in the public square, February 12, 1849.<sup>2</sup> Myron Norton presided, and T. W. Perkins acted as secretary. The object of the meeting having been stated by the chairman, Mr. Hyde introduced a plan of organization or government for the district of San Francisco, which grew out of the "necessity of having some better defined and more permanent civil regulations for our general security than the vague, unlimited, and irresponsible authority" which then existed. It provided for a legislative assembly for the district of San Francisco, consisting of fifteen members, citizens of the district, eight of whom should constitute a quorum for the transaction of business. The assembly was empowered to make such laws as it might deem essential to promote the happiness of the people, provided they should not conflict with

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<sup>1</sup> Annals, 135.

<sup>2</sup> The confusion was greatly increased by the incoming tide of population. Between January 1 and June 30, 1849, 15,000 persons are said to have been added to the population of the country, 10,000 of whom came by sea and landed at San Francisco. There were among these only 200 females. The second half of the year the arrivals averaged 4,000 a month, and only 500 females in the whole 24,000. At the close of 1849 the population of San Francisco was between 20,000 and 25,000.

the Constitution of the United States, nor be repugnant to the common law. To become a law a bill had to be passed by the legislative assembly and to be signed by the speaker and the recording clerk. It was required, moreover, that the legislative assembly should determine its own rules, and keep a journal of its proceedings, and that the members should enter upon the duties of their office on the first Monday of March.

In addition to the legislative assembly, the plan proposed by Mr. Hyde provided that for the purpose of securing to the people a more efficient administration of law and justice, there should be elected by ballot three justices of the peace, of equal though separate jurisdiction, who should be empowered by their commission of office to hear and adjudicate all civil and criminal issues in the district, according to the common law; that an election of members of the legislative assembly and of justices of the peace should be held on Wednesday, February 21, 1849; and that all should hold office "for the term of one year from the date of their commissions, unless sooner superseded by the competent authorities from the United States government, or by the action of a provisional government now invoked by the people of this territory, or by the action of the people of this district." In the several articles as well as in the oath to be required of officers, the supremacy of the Federal government was fully recognized.<sup>1</sup>

Considering the importance of the matters in hand, the action of the meeting appears startlingly sudden. It is difficult to find a briefer history of the establishment of a government than that contained in the records of this meeting. "Mr. Harris moved the adoption of the plan entire," so runs the record, "which was seconded; when Mr. Buckalew moved to supersede the plan of government presented, by submitting the subject to a committee to be appointed by the meeting, and whose duty it should be to report to an adjourned meet-

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<sup>1</sup> Executive Document No. 17, House of Rep., 1st Session, 31st Congress, p. 728.

ing. Thereupon an animated discussion ensued. Mr. Buckalew's motion having been seconded, was lost by vote; when the question recurred on the original motion of Mr. Harris, which was carried almost unanimously."<sup>1</sup> By further action of the meeting, it was determined that every male resident of the age of twenty-one years or upwards, should be entitled to vote, and that the members of the town councils claiming authority should be requested to resign, and a committee was appointed to receive their resignations.

In accordance with the provisions of this fundamental law, an election was held on the 21st of February, when Myron Norton, Heron R. Per Lee, and William M. Stewart were elected justices of the peace. The members of the legislative assembly elected at the same time were Stephen A. Wright, Alfred J. Ellis, Henry A. Harrison, George C. Hubbard, George Hyde, Isaac Montgomery, William M. Smith, Andrew J. Grayson, James Creighton, Robert A. Parker, Thomas J. Roach, William F. Swasey, Talbot H. Green, Francis J. Lippitt, and George Hawk Lemon. They took the prescribed oath, which was administered by Justice Per Lee, and held their first meeting on the evening of March 5. At this meeting the legislative assembly elected Francis J. Lippitt speaker and J. Howard Ackerman clerk. In the second and third meetings, it completed its organization by adopting rules for conducting business, and by appointing a list of standing committees.

These rules embodied the ordinary provisions for conducting business in a parliamentary assembly. The speaker had no vote, except in cases of tie, and in cases of ballot. Special meetings might be called at any time by the speaker on the written application of three members. Every petition or other paper presented to the assembly was referred to its appropriate standing committee as a matter of course, without a vote, unless such reference was objected to by some member.

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<sup>1</sup> Dwinelle, "Colonial History."



All resolutions and reports of committees were required to lie on the table for consideration till the next meeting. Bills were introduced either on the report of a committee or by motion for leave, and in the latter case a day's notice of the motion was required. Before becoming a law a bill was required to be read three times, and after the second reading it could not be amended by the assembly, except on the recommendation of a committee to which at any stage of its progress it might be committed. The enacting clause was in these words: "The people of the district of San Francisco, California, represented in Assembly, do enact as follows:" Having passed the assembly a bill required the signatures of the speaker and of the recording clerk before it could obtain the validity of a law.

There were five standing committees provided for: a committee on ways and means; a committee on the judiciary; a committee on expenditure; a committee on public health and police; a committee on public buildings and improvements. These committees were appointed by ballot, one vote being taken for the chairman of each committee, and one vote for the other members in a body. All other committees were appointed by acclamation and a plurality of votes was necessary for a choice, whereas in the election of a chairman of a standing committee, a majority of the whole number of votes given was required.

The meetings of the assembly were held in the school-house, generally known at this time as the "Public Institute," which appears to have been devoted to various public uses. On the 17th of March, the assembly resolved by vote "that the Public Institute, by order of this House, be appropriated as a court room temporarily, until suitable accommodations can be had, unless the same should be wanted for a public school;" and on the 19th a committee of the assembly was appointed to inform the Rev. Mr. Hunt that it was at his disposal for religious services on Wednesday and Saturday evenings. Prior to the first of November, 1848, there

had been no regularly established Protestant church at San Francisco. Only occasional Protestant services had been held there. At this time, however, "the Rev. T. D. Hunt who had been invited from Honolulu was chosen Protestant chaplain to the citizens."<sup>1</sup> He was given a salary of twenty-five hundred dollars a year to be paid out of subscriptions by the people of the town.

On this evening, moreover, March 19, 1849, Mr. Hubbard introduced a bill into the legislative assembly to abolish the office of alcalde, which, as amended, came up for a third reading March 22, and was passed unanimously. It enacted that all powers vested in the office of alcalde should cease to be in force in the town and district of San Francisco, and the office be abolished; and "that Myron Norton, Esq., having received the highest number of votes at the election of justices, held on the twenty-first of February of the present year, shall be and he is hereby appointed, authorized and empowered to act as, exercise and execute the power, duty and office of, police magistrate of the town and district of San Francisco, for the time being, and to receive from the alcalde all books, records, papers and documents whatsoever relating to his office and belonging to the said town and district, in his possession, who shall safely keep the same until otherwise directed by this legislative assembly." The police magistrate was required by the terms of the act to begin the exercise of his duties on the 25th of March, 1849, and he was empowered to appoint two or more policemen, who might arrest any person upon a warrant issued by the magistrate. The police department thus created supplanted the constables, sheriffs, and other officers established under the alcalde who, by this act, were declared dismissed. Any person "assuming to serve any writ or process" within the district, except by order and under the authority of the police magistrate and justices, became liable to a fine of one hundred dollars; and any one except the police magistrate and

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<sup>1</sup> Annals, 207.

the justice of the district assuming to issue any writ or process within the district, after the 25th of March, would become liable to a fine of not less than one hundred nor more than five hundred dollars—one-half of the fine going to the informer, and the remainder to the use of the district. To make the transfer of power from the alcalde's government to that of the legislative assembly complete, it was voted, March 26, that the committee of expenditures should "be constituted a select committee to audit the accounts of T. M. Leavenworth, the *late* alcalde of this district, and the said district and town of San Francisco." At the same meeting a bill was passed establishing the office of district attorney, and C. T. Botts was elected by ballot to fill the office thus created. Mr. Botts, however, declined the office, and at the meeting of the legislative assembly, held March 29, George Hyde was unanimously elected. Mr. Hyde was willing to accept the office, but thought he should first resign his seat in the assembly. This body, however, resolved that there would "be no impropriety in the district attorney continuing to be a member of the legislative assembly."

Although during the three months of its existence, the legislative assembly met no less than thirty-five times, yet on many of these occasions it was not possible to transact business because of the lack of a quorum. This was the case on the evening of March 23, and on the evening of April 2. On April 3, a quorum was finally secured, and a bill was then passed establishing the office of Harbor Master, which was filled on the same evening by the election of Capt. E. A. King. The absence of members finally became so serious an evil that, on the 9th of April, Mr. Swasey offered a resolution to the effect "that in the opinion of this Assembly, the continued absence of some of its members shows a lack of duty towards the people and a disrespect to this body." This resolution, although adopted unanimously at the meeting on the 10th of April, did not remove the evil, and near the end of April it was determined to increase the number of repre-

sentatives in the legislative assembly to twenty-five, with the expectation "that if ten new members were added, a quorum might be obtained for the transaction of business." The ten additional members, having been duly elected, appeared May 14, and took the oath of office.<sup>1</sup>

Almost from the beginning of its history the legislative assembly had agitated the project of forming a general code of laws for the town and district of San Francisco. Such a code was finally passed on the 10th of April, 1849. Among other effects, it established a Justice's Court for the trial of causes; it regulated the practice in the Courts of law; it constituted a Criminal Court for the district of San Francisco; it also established a Court of Appeals for the same district; it established the office of Register in the district of San Francisco, fixed the rates of salaries, and determined certain regulations touching the descent and distribution of intestate estates.

Besides the Police Court, there existed, therefore, under the authority of the legislative assembly, after the adoption of

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<sup>1</sup>The manner in which the number of members was increased may be seen from the following resolutions taken from the minutes of the meeting of May 3:

"Whereas, The necessary business of this Legislative Assembly has been frequently delayed, to the detriment of the good people of this District, by reason of the absence and non-attendance of its members; and whereas, it is believed that if ten new members be added, a quorum may be obtained for the transaction of business, therefore,

"Resolved, That the people of the District of San Francisco be requested, at the next election to be held in this district, to vote for ten new members to said body, who shall be qualified to their office at the next meeting of the Assembly succeeding the close of the election.

"Resolved, That the people be requested to signify on their respective votes at the said election, by the words 'Aye' or 'No,' their consent or dissent that the ten new members be added, and if it be found that a majority has expressed in favor thereof, the members elect to be qualified and take their seats, and not otherwise." This last provision appears to have been somewhat modified by a later resolution of the Assembly, "that the words *in favor of an addition of ten to the number of the Assembly*, or *against the addition of ten to the number of the Assembly*, be the form to be printed on the votes at the next election."



the Code, a Court of Appeals, the Orphans' Court, and the Criminal Court. The judges of these three Courts were William M. Stewart, of the first, Theron R. Perley, of the second, and Myron Norton, of the third. But in spite of the great legislative activity of the Assembly, the affairs of the revenue and the expenditure remained throughout the three months of its existence in an unsettled and unsatisfactory condition.<sup>1</sup>

About six weeks after the organization of the legislative assembly, April 13, 1849, General Bennet Riley became military governor of California. On the fourth of the following June, he issued a proclamation to the people of the district of San Francisco, stating that proof had been laid before him that a body of men styling themselves "the Legislative Assembly of the District of San Francisco," had "usurped powers which are vested only in the Congress of the United States by making laws, creating and filling offices, imposing and collecting taxes without the authority of law, and in violation of the Constitution of the United States, and of the late treaty with Mexico;" and warning all persons "not to countenance said illegal and unauthorized body, either by paying taxes or by supporting or abetting their officers." He had, moreover, received due proof "that a person assuming the title of sheriff, under the authority of one claiming to be a justice of the peace in the town of San Francisco, did, on the 31st of May last, with an armed party, violently enter the office of the 1st Alcalde of the District of San Francisco, and there forcibly take and carry away the public records of

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<sup>1</sup> For a record of the organization and acts of the Legislative Assembly, see "Executive Documents," No. 17, House of Representatives, 1st Session, 31st Congress, p. 728; Dwinelle, "Colonial History of San Francisco," Addenda, No. LXXIII; "Minutes of the Proceedings of the Legislative Assembly of the District of San Francisco, from March 12, 1849, to June 4, 1849, and a Record of the Proceedings of the Ayuntamiento or Town Council of San Francisco, from August 6, 1849, until May 3, 1850," San Francisco, 1860, pp. 5-46.

said district from the legal custody and keeping of said 1st Alcalde." In view of this unlawful act, he called upon all good citizens to assist in restoring the records to their lawful keeper, and in sustaining the legally-constituted authorities of the land.

"The office of justice of the peace in California," the proclamation continues, "even where regularly constituted and legally filled, is subordinate to that of alcalde; and for one holding such office to assume the control of, and authority over, a superior tribunal, argues an utter ignorance of the laws, or a wilful desire to violate them, and to disturb the public tranquillity. It is believed, however, that such persons have been led into the commission of this rash act through the impulse of the moment, rather than any wilful and settled design to transgress the law; and it is hoped that on due reflection they will be convinced of their error, and unite with all good citizens in repairing the violence they have done to the laws. It can hardly be possible that intelligent and thinking men should be so blinded by passion, and so unmindful of their own interests and the security of their property, after the salutary and disinterested advice and warnings which have been given them by the President of the United States, by the Secretaries of State and of War, and by men of high integrity and disinterested motives, as to countenance and support any illegally constituted body in their open violation of the laws, and assumption of authority which in no possible event could ever belong to them.

"The office of alcalde is one established by law, and all officers of the United States have been ordered by the President to recognize and support the legal authority of the person holding such office; and whatever feelings of prejudice or personal dislike may exist against the individual holding such office, the office itself should be sacred. For any incompetency or mal-administration, the law affords abundant means of remedy and punishment—means which the Execu-

tive will always be found ready and willing to employ, to the full extent of the powers vested in him.”<sup>1</sup>

This proclamation denouncing as an illegal body the legislative assembly which for three months had performed all the functions of a town government, was followed the next day, June 5, by an order from Governor Riley, restoring the ayuntamiento to power. This order was based on the well grounded opinion that all the laws of California existing at the time the country was annexed to the United States, which were not in conflict with the constitution, laws, and treaties of the United States, were still in force and must continue in force till changed by competent authority. The powers and duties of all civil officers remained as they had been before the conquest, except so far as they might have been modified by the act of annexation. This order by which the legislative assembly was set aside and power was restored to the council or ayuntamiento, affirmed the traditional power of the council over the lands of the pueblo.

The last meeting of the legislative assembly was held on the 4th of June, and the election ordered by Governor Riley took place on the 1st of August. At this election there were 1,516 votes cast, of which John W. Geary, candidate for the office of first alcalde, received the whole number. Frank Turk, who was elected second alcalde, received 1,055 votes. The ayuntamiento or town council elected at this time consisted of twelve members, namely: Talbot H. Green, Henry A. Harrison, Alfred J. Ellis, Stephen C. Harris, Thomas B. Winton, John Townsend, Rodman M. Price, William H. Davis, Bezer Simmons, Samuel Brannan, William M. Stewart and Gabriel B. Post. Horace Hawes was elected prefect, and Francis Guerrero and Joseph R. Curtis were elected sub-prefects. Peter H. Burrett was elected judge of the Supreme Court.

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<sup>1</sup> Executive Document No. 17, House of Rep., First Session, 31st Congress, p. 773.

At the second meeting of the newly elected council, Mr. Geary, the first alcalde, spoke at length on the affairs of the town, and asked the co-operation of the council "in making it, in point of order and security, what it must shortly be in wealth and importance, the first city, and great commercial and moneyed emporium of the Pacific."<sup>1</sup>

"Economy in the expenditure of public money," he said, "is at all times desirable and necessary; but situated as we are here, without any superior body to legislate for us, the people of the city will, of necessity, be called upon to assume a responsibility in the enactment of laws, and in the expenditure of money for public purposes, not usual under ordinary circumstances." The city was, at this time, without a dollar in the public treasury; there was neither an office for the magistrate, nor any other public edifice. "You are," continued the alcalde, "without a single police officer or watchman, and have not the means of confining a prisoner for an hour; neither have you a place to shelter, while living, sick and unfortunate strangers who may be cast upon our shores, or to bury them when dead. Public improvements are unknown in San Francisco. In short, you are without a single requisite necessary for the promotion of prosperity, for the protection of property, or for the maintenance of order."

In view of this condition of things, it was clear that the most important question to be considered by the new government was the question of taxation, and to this the alcalde directed a large part of his address. "There is perhaps no city upon the earth," he said, "where a tax for the support of its municipal government can be more justly imposed than here. Real estate, both improved and unimproved, within a short space of time, has increased in value in many instances a thousand-fold, and even at its present high rates, will produce in the shape of rents the largest average income upon

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<sup>1</sup> Minutes of the Ayuntamiento, August 8, 1849. The address is printed in the "Annals," but it is there set down as delivered at the first meeting.



record. Yet notwithstanding this unprecedented increased value of real estate, the burdens of government should not be borne by a tax upon that species of property alone ; each and every kind of business carried on within the limits of the district should bear its just and proper share of taxation.

“The charters of most cities in the United States, granted by the legislature, give the corporation the right to levy and collect a tax, as well to defray the expenses of its municipal government as for public improvements ; and it is usual to submit a tax bill to the legislature for its confirmation. This is done to prevent abuses. Yet I do not know of an instance where the tax imposed has been reduced by the legislature. In towns not incorporated there is no resort to be had to the legislature for a confirmation of the tax laws. The town officers, chosen by the people, impose the taxes, and collect a sufficient revenue by common consent ; and their right to do so is never questioned. That you have a right to levy and collect a reasonable and proper tax, for the support of your municipal government, cannot, in my judgment, for a moment be questioned. In the absence of State legislative authority you, as the representatives of the people, are supreme in this district, and your acts, so long as you confine them strictly to the legitimate sphere of your duty, will not only be sanctioned and approved by the present worthy executive of our government in California, but will be most promptly confirmed by the legislature, whenever one shall be assembled either for the Territory or State.

“I would, therefore, recommend that with all convenient despatch, you ascertain, as near as possible, the amount of funds deemed necessary for the support of a proper and efficient municipal government for one year ; that when you shall have determined this, you shall proceed to collect a just, equitable tax upon real estate and upon sales at auction ; and that you require all merchants, traders, storekeepers, etc., to take out a license for the transaction of their business, paying therefor an amount proportionate to the quantity of merchandise vended

by them. Also, that all drays, lighters, and boats, used in the transportation of merchandise, and of passengers, to or from vessels in the harbor, be licensed.

“There is also another class of business proper to be taxed, which although sometimes prohibited by law, yet in many countries is regulated by law. I recommend you to adopt the latter course. The passion for gambling is universal, even where the severest penalties are imposed to prevent its indulgence. And it is a fact well known and understood, whenever gaming tables are licensed and subject to proper police regulations, they are less injurious to the interests and morals of the community than when conducted in defiance of law. In the one case the proprietors are amenable to the law which authorizes them, and are subject to proper control, while on the other hand, if prohibited, the evasion of the law by such means as are usually resorted to, does but increase the evil, and the community is in no way benefited. I would, therefore, recommend, under present circumstances, and until State legislation can be had on the subject, that you license gaming and billiard tables.”

In this address, the alcalde, moreover, urged the council to adopt measures for the promotion of popular education, in order that California, when erected into a State, might show the older States of the Union “that she fully appreciates education as the only safeguard of our republican institutions.” He also called attention to the fact that “the public documents containing all the muniments of title, etc., for real estate,” were not to be found in official but in private hands, and asked for “authority to appoint a committee of three respectable and intelligent citizens, who, under oath, shall make an inventory of the said documents, and a schedule of any mutilation, erasures, or interlineations which may be found on their pages.”

But the council had already anticipated this suggestion of the alcalde's address, for at the first meeting on the 6th of August, two days before the address was read, the president

of the council had been authorized to appoint three commissioners to take an inventory of all public documents which might be turned over to them by the late alcalde, or any other persons. The resolution conveying this authority provided further that the commissioners should not be members of the council.<sup>1</sup> These commissioners were subsequently appointed, and by a resolution of the council, passed August 20, the pay of one of them, Mr. Toler, was fixed at sixteen dollars a day, and that of the other at ten dollars a day.

At an adjourned meeting, the third held by the newly elected town council, the oath of office was administered to Mr. Horace Hawes as prefect, who took the occasion to address the council on the powers and duties of the government which had just been organized.

“Under the peculiar circumstances of this district,” he said, “with a population composed of recent immigrants, who, owing to that fact, must necessarily be unacquainted, to a great extent, with the existing laws, it may not be inappropriate for me to allude briefly to those provisions which define our respective functions; and I would remark in passing, that the laws now in force in this country, when well understood, may not be found so inadequate to the purposes of good government as has generally been supposed. It is, perhaps, the abuses and mal-administration which may have existed under the former government, rather than any defect in the laws themselves, which have brought them into disrepute.

“The duties of prefects, though enumerated in twenty-nine separate articles of the code, which will shortly be placed in your hands, may be briefly expressed. They are ‘to take care of public order and tranquillity; to publish and circulate, without delay, observe, enforce, and cause to be observed and enforced, the laws throughout their respective districts; and for the execution of these duties, they are clothed with certain

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<sup>1</sup> Minutes of the Ayuntamiento from August 6, 1849, to May 3, 1850.

powers which are clearly specified and defined. They are particularly enjoined to attend to the subject of public instruction, and see that common schools be not wanting in any of the towns of their respective districts; they are also required to propose measures for the encouragement of agriculture and all branches of industry, instruction, and public beneficence, and for the execution of new works of public utility and the repair of old ones; they constitute the ordinary channel of communication between the governor and the authorities of the district, and are to communicate all representations coming from the latter, accompanied with the necessary information.'

"The general subjects of your charge, gentlemen, are the police, health, comfort, ornament, order and security of your jurisdiction, and you will perceive from an examination of the laws on the subject, that you are invested with extensive powers as respects the various matters upon which you are to act; and when we consider the probable destiny of the infant city, for which you have accepted the office of guardians, in respect to population, wealth and commercial greatness, the prudent exercise of those powers becomes a subject of incalculable importance. In all arrangements and improvements that are to be permanent, it will be well to take into view the interests, not only of the present, but of future ages; to regard San Francisco, not merely in its present condition, but in its *progress* and the maturity of its greatness. By a prospective view, behold it not only the commercial metropolis of the west, but for beauty and ornament, and the beneficence of its arrangements and institutions, the *model city*.

"Although the lapse of time and the possession of public resources, not now at your disposal, will be indispensable to fulfil these expectations, and it will be for posterity to enjoy and to realize what you have contemplated, you will have it in your power, at least, to prevent any obstacles being interposed that might retard or effectually hinder your city from attaining a destiny so happy and so glorious. From this single



view you will perceive the importance of the functions which you have to fulfil. You act as Town Council only, it is true, but the subject of your charge is to be regarded in its important relations to the State, to the republic, and to the commercial world. Every American citizen will feel that he has an interest in it, and will look to the results of your prudent councils with pride and satisfaction. Your being the first Town Council regularly organized under the American Government, your proceedings will be reviewed by succeeding ones in all future time, and regarded with satisfaction, or with regret, as they may have facilitated or retarded the prosperity of the place.”<sup>1</sup>

At the same meeting in which Mr. Hawes addressed the council, a number of standing committees were named by the chair: on judiciary, on finance, on streets and public improvements, on police and health, and on expenditures. On the 13th the council appointed a number of municipal officers. Frank Turk was made secretary; William M. Eddy, city surveyor; P. C. Landers, collector of taxes; Jonathan Code, sergeant-at-arms; Malachi Fallon, captain of police; A. C. Peachy, city attorney. Subsequently, on the 20th, Benjamin Burgoyne was elected city treasurer; Dr. J. R. Palmer, city physician; and at the same time the alcalde announced that, in compliance with the instructions of the council, he had appointed John E. Townes sheriff, who had given the required bond in the sum of twenty-five thousand dollars.

The report made by the committee on finance as to the most expedient means for raising a revenue, was adopted on the 27th of August, and, after various modifications, became the basis of a financial policy for the city. It established “a percentage duty on the sales of merchandise and real estate, and imposed heavy license duties on those engaged in different kinds of business.”<sup>2</sup> This ordinance having been brought to

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<sup>1</sup>“Minutes of the Proceedings of the Legislative Assembly and of the Ayuntamiento or Town Council,” pp. 221-223.

<sup>2</sup> Annals, 234.

the notice of the prefect, Mr. Hawes, he returned it to the council with his objections fully stated. In the prefect's view it was in conflict with the laws; it imposed taxes which were unequal and disproportioned to the circumstances and abilities of those having to pay them; it was calculated to weigh most heavily and injuriously upon those of limited capital and resources, who ought to receive encouragement and protection; the amount of revenue it would produce was far beyond the needs of the town. In the ordinance imposing the tax there was no specification of the objects to which the revenue was to be applied, and the tax-payers should know for what purpose their money is required. Two main objections are thus raised against the proposed taxes. In the first place, they were excessive. In the second place, they would fall unequally on the tax-payers, and disproportionately to their ability to pay. "Revenue laws," says the prefect, "should be so adjusted as to foster industry and encourage labor, by freeing it from all unnecessary burdens. But this ordinance does precisely the reverse. It makes the drayman pay a tax of eighty dollars a year—probably as much as his cart and mule will be worth at the end of that period—that is, it taxes him to the full amount of his capital. The boatman is taxed upon precisely the same scale. The ordinance takes the whole capital of both, and gives them only the use of it for one year, worth, according to the customary rate of interest here, twelve per cent. The tax upon auction sales, being proportioned to the amount, is more just and equal, but much too high for the wants of the treasury. That imposed upon merchants and traders, however, is glaringly unequal and disproportioned. The wholesale dealer, with a capital of \$150,000, will have to pay \$400 a year, or about two and two-thirds mills on a dollar, while the small trader, who occupies a tent or shed, with a capital of no more than one thousand dollars, will pay three hundred dollars a year, or thirty-three and one-third dollars on a hundred—that is, the latter will pay a little over one hundred and twenty times as much in proportion to his ability as the former. The ped-

lar, who is not able to invest above one hundred dollars at once, perhaps, will pay six hundred dollars, or about twenty-four hundred times as much as the first mentioned. Supposing a monte bank, which pays a tax of six hundred dollars a year, by this ordinance, to have ten thousand dollars employed; then, as between the itinerant trader and the gambler, the patronage of the council is in favor of the gambler by one hundred to one—that is, the former has to pay, relatively, one hundred times as much as the latter.” Besides these fundamental objections, the prefect finds still others, the most noteworthy of which is the severity of the punishment inflicted on hawkers and pedlars who ply their trade without a license. The ordinance, he observes, “makes the act of peddling without a license, whether from ignorance of the ordinance or a design to violate it, a misdemeanor, but subjects the offender to a total forfeiture of all his goods and chattels; ‘for all the goods, wares, merchandise, provisions, or clothing found in his possession at the time of his arrest,’ will, in most cases, include all the property he has in the world.”

The message containing these objections was received and read before the council at the meeting on the 10th of September, 1849, and at an adjourned meeting two days later, the ordinance for revenue was taken up and amended. A committee was then appointed to wait on Governor Riley and ask for his approval of the bill. The amended articles from 1 to 8 inclusive were, in the governor’s opinion, “in strict accordance with the laws and customs of the country.” In the same communication the governor also expressed the opinion that the prefect had no power to veto ordinances passed by the town council, it being the duty of the prefect, to use the governor’s words, “to exercise, in the administration and expenditure of municipal funds, such supervision as may be granted to him by the ordinances of the ayuntamiento; and in case they exceed their authority, he must report the fact to the governor.”

Much of the confusion which appeared in the local affairs

of San Francisco, and of the uncertainty as to the powers and functions of the officers was due to the fact that California remained without a strictly and clearly defined legal status under the dominion of the United States. At the time of the election of the town council which succeeded the legislative assembly, there were also elected at San Francisco five delegates to the convention called to frame a constitution for California. These were Edward Gilbert, Myron Norton, Wm. M. Gwin, Joseph Hobson, and Wm. M. Stewart. The convention met in Monterey on the 1st of September, completed its work on the 13th of October, and the constitution was adopted by popular vote on the 13th of November. It was not until late in the following year, however, the 9th of September, 1850, that California was admitted to the Union as a State. But at the time of the adoption of the constitution a full list of State officers had been elected, and a political organization was formed long before the Congress had finished wrangling over the question of admission. It was the legislative department of this unauthorized organization that, on April 15, 1850, passed the first city charter of San Francisco.

The last ayuntamiento under the old order of things was elected on the 8th of January, in which John W. Geary was re-elected first alcalde, and Frank Turk second alcalde. A number of the members of the previous council were also re-elected. The new council met on the 11th of January. The prefect administered the oath of office to Mr. Geary as first alcalde, who in turn administered it to the members of the council. The former secretary, Henry L. Dodge, was unanimously elected to the same position, and after he had taken the oath of office, the council was declared organized. The business devolving on the council was executed through a number of standing committees: on the judiciary, on health and police, on finance, on expenditures, and on streets, and public buildings, and public improvements. There was also appointed a committee on education, to whom were referred all matters relating to common schools and public education.



Aside from the details of the current business of a rapidly increasing community, two questions of special importance occupied the attention of the municipal officers, between the time of the organization of the council and the 3d of May, the time of its last meeting. These were the question of the land grants and the question relative to the formation of a charter for the city.

On the 21st of December, 1849, the ayuntamiento having learned "that J. Q. Colton, a justice of the peace for the town of San Francisco, had assumed the authority and pretended to exercise the right of selling, granting and disposing of lots within the limits of the town," resolved, therefore, to institute legal proceedings against him in order "to restrain him in such illegal and unwarrantable practices, and to make him amenable, by due process of law, for a misdemeanor and malfeasance in office." A similar charge was also brought against Mr. Leavenworth, sometime alcalde of San Francisco. In the meeting of the council, held December 24, it was resolved to declare "all grants of town lots made and signed by J. Q. Colton, void and of no effect." On the 19th of February, 1850, Horace Hawes, the prefect of San Francisco, addressed a note to the ayuntamiento enclosing a communication from Peter H. Burnett, who had been elected governor of California at the time of the adoption of the constitution, and who had then assumed the authority hitherto held by Governor Riley. This communication ordered that no further sales of the municipal lands be made until the further order of the executive, or until the Legislature should have passed some Act in reference to them. In this order Burnett defines himself as "Governor of the State of California," and yet California was not within six months of admission to the Union. In opposition to this view of the prefect and the governor stands the conclusion reached by the city attorney, A. C. Peachy, in a report made to the ayuntamiento on the 25th of February. After a somewhat minute examination of Mexican law on the point in question, h

reached the conclusion "that all lands in the vicinity of the old mission of San Francisco de Asis, and the landing of Yerba Buena, not included in the legal grants to private individuals, or in reserves made by the government, belong to the municipality of San Francisco, and are subject to be sold at public auction, or granted in *solares* or building lots, in the manner directed by law."

The town council regarded with great disfavor the interference of the governor in the sale of town lots, and on the 25th of February, 1850, resolved "that in our opinion the governor of California has no right to interfere in the sale of town lots." The sale which had been fixed for the 4th of March was postponed until the 4th of April. The council, however, wished to have it understood that in postponing the sale they were not actuated by any fear of the governor of the State interfering in the sale, but that they did it because they wished that those who were anxious to purchase lots might have time to enquire into the powers of the council in the matter. They wished, moreover, to have it understood that they considered the interference of the governor "to be a high-handed act of usurpation on his part, and one in which neither the law nor the opinion of the public sustains him." The original resolutions from which this quotation is derived were finally set aside by the following substitutes, which were passed:

"*Resolved*, That the Constitution of the State of California prescribes the duties, and limits the powers, of the governor; and therefore this council recognize no power in the executive to interfere in their municipal affairs.

"*Resolved*, That any attempt so to interfere, under the pretense that such right is the prerogative of the governor, *ex officio*, or belongs to him as the executive of Mexican law, is inconsistent with the provisions of the constitution, and is an assumption of power dangerous to the rights and liberties of the people."<sup>1</sup>

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<sup>1</sup>Proceedings of the Ayuntamiento or town council, March 2, 1850.

Through a communication read before the ayuntamiento at the meeting of February 25, the prefect demanded information on certain points :

“*First*, How many, and what water and town lots have been sold by the ayuntamiento since the 1st of August last, the date of the sale, price paid for each lot, and the name of the purchaser, with the terms of payment.

“*Second*, How many of the said town lots, if any, have been originally purchased by members of the ayuntamiento, at sales, public or private, ordered by that body.

“*Third*, Whether, by the resolutions ordering the public sale made on the 3d of January, or any other public sale of said lots, it was provided that a credit should be given for the purchase-money, and if so, whether notice that such credit would be allowed was given to the public in the printed advertisements of such sale.

“*Fourth*, Whether on the night of the 7th January last, the night preceding the election for members of the ayuntamiento, several of the old members met and resolved to appropriate \$200,000 for building a wharf at the foot of California street, and if so, who of such members were present at such meeting, and who presided thereat.

“*Fifth*, Whether the water lots adjoining the line of the proposed wharf were purchased by the same members who made the appropriation, and when.”

The prefect had informed the ayuntamiento that on the 1st of March a full and complete account, as required by law must be rendered by them, of their administration of the municipal funds, in order that it might be forwarded to the governor and published for the information of the people. It does not, however, appear that the account was rendered in accordance with this request or that satisfactory reply was made to the prefect's list of questions. The communication containing them was read before the council and laid on the table.

The required account not having been received, and the

advertised sales of municipal lands not having been postponed, the prefect appeared in a somewhat excited state of mind: "Your Excellency," he wrote, "will therefore perceive that an issue is clearly presented between the ayuntamiento of San Francisco and the constituted executive authorities of the State. The question to be decided before this community, and before the people of the State is, whether the arbitrary will of the members of the town council or the laws of the land, supported by the executive authorities, shall be the rule in the administration of public affairs." At the same time he demanded definite instructions for his "governance in this crisis," and stated, moreover, that in his view the general sentiment of the citizens of San Francisco was opposed to a further sale of town lots, and that in the "depressed state of monetary affairs, a forced sale would be attended with immense sacrifice of present and future values to the town."

Two days after this writing, Governor Burnett directed the attorney-general of California to aid the prefect and sub-prefect in an examination of the law, with the view: "first, to file a bill in chancery against the ayuntamiento for such accounts as the law requires them to make out and transmit to the sub-prefect; second, to file a bill in chancery to restrain the town council from completing the sales of lots made after the issuing of my order suspending the sales, and from collecting any of the money due upon obligations given for the purchase of such lots; third, to file a bill in chancery to set aside all the purchases of town lots made by any member of the town council before or since the issuing of my orders." In this communication, the governor left the prefect, after consultation with the attorney-general, to take what steps he might deem requisite, and confessed that he had no power to suspend the ayuntamiento except by the consent of the Legislature.

The conflict of authorities which threatened to be serious was finally averted by the retirement of the ayuntamiento. On the 15th of March, 1850, E. J. C. Kewen, the attorney-



general, wrote to Governor Burnett in a somewhat exultant tone of victory: "The enemy have fled, and we are the sole occupants of the field. The sale is indefinitely postponed. I advised Hawes to exert the authority of his office to the utmost extent that law would justify, and in the event of failing to accomplish the desired end, I should have proceeded without further delay upon a writ of *quo warranto*. They are evidently fearful of any action that will cause an investigation into the extent of their authority, and catching some hint of ulterior proceedings in contemplation, in case of disobedience to executive behests, they have exposed the character of the beast that paraded so ostentatiously in the lion's skin."<sup>1</sup>

The prefect, by this victory, did not achieve lasting glory. On the 29th of March, 1850, he was suspended by Governor Burnett on charges preferred by the ayuntamiento of San Francisco. The *Alta California* of April 1, commenting on the governor's action, stated it as a matter of notoriety that Prefect Hawes had "been continually annulling the acts of the ayuntamiento, and sending forth complaints and pronunciamientos against them," and "that he had it in contemplation to assume the entire control of the town affairs."

Further investigation of the supposed frauds in connection with the sale of land within the limits of the town were deferred to a later time.

At a meeting of the ayuntamiento, December 1, 1849, Samuel Brannan moved to authorize the alcalde to appoint a day for the election of eleven delegates to draft a city charter to be presented to the State Legislature for adoption. This motion was lost; but on the 12th of the same month he offered a resolution of a somewhat similar purport, which was adopted. This second resolution, however, provided that the committee of five to draft the charter should be appointed by the chair. Messrs. Brannan, Davis, Turk, Harrison and Price were appointed, and by a subsequent resolution they

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<sup>1</sup> "Minutes of the Ayuntamiento, 1849-1850," p. 237.

were authorized to examine and define the extent of territory to be embraced within the limits of the city. This committee failed to perform the work required of it, and at a meeting of the ayuntamiento, January 16, 1850, the committee on judiciary was instructed to submit a charter to the council on the 28th of the month, which, if approved, would be presented to the citizens on the first Monday of February. This committee was authorized to procure such legal advice and assistance as they might deem advisable, to aid them in drafting the charter in accordance with their instructions. The charter as formed by the judiciary committee was submitted to the council on the 30th of January, 1850. It was read by sections, amended and adopted. It was then referred back to the committee to be engrossed, and the committee was instructed to have five hundred copies of it printed and distributed among the citizens of San Francisco. On the 13th of February a special meeting of the ayuntamiento or council was called for the reconsideration of the charter. As amended at this meeting, in a committee of the whole, it was finally adopted by a vote of four to three. Messrs. Hagan and Green were then requested to present it to the San Francisco representatives in the Legislature that it might be adopted by that body.

A few weeks later, March 11, the Legislature passed a general Act providing for the incorporation of cities. Under this Act any city in the State, of at least two thousand inhabitants, might be incorporated, either by the Legislature or by the County Court, upon application. The outline of a charter embraced in this Act provided for a government by a mayor, recorder and common council, who should possess the power usually belonging to a municipal government. Before the passage of this general law, an Act had been passed, February 27, to incorporate Sacramento City. Benicia, San Diego and San José were incorporated on March 27. Three days later, March 30, an Act was passed incorporating Monterey, and on the 4th of April Sonoma and Los Angeles were added to the

list. The incorporation of Santa Barbara followed, April 9, and that of San Francisco on April 15. San Francisco was thus the ninth city of California incorporated after the adoption of the Constitution.

### III.

The territory embraced within the boundaries fixed by the charter of 1850, was only a small part of that to which the city was entitled, according to later judicial decisions. The southern boundary of this territory was a line parallel to Clay street and two miles distant, in a southerly direction, from the centre of Portsmouth Square. The western boundary was a line one mile and a half distant, in a westerly direction, from the centre of Portsmouth Square, running parallel to Kearney street. The northern and eastern boundaries were the same as those of the county of San Francisco. This was a limitation for the purposes of municipal administration, but it was provided that it should not be "construed to divest or in any manner prejudice any right or privilege to which the city of San Francisco may be entitled beyond the limits above described." Provision was made for dividing the city into eight wards, which could not be altered, increased, or diminished in number except by the action of the Legislature. The division was to be made by the first council elected under the charter, and was to be so made that there should be in each ward, as near as might be, the same number of white male inhabitants. The government of the city was vested in a mayor, recorder, and common council, the council consisting of a board of aldermen and a board of assistant aldermen. Each board was composed of one member from each ward, had the right to elect its president, and was in the enjoyment of all those privileges and prerogatives which usually pertain to a legislative assembly. Under the charter, moreover, provision was made for a treasurer, comptroller, street commissioner, collector of city taxes, city marshal, city attorney,

and from each ward two assessors. These offices were all elective, and the time fixed for the election was the fourth Monday of April in each year. The elections were ordered by the common council, whose duty it was to designate the place of holding them; to give at least ten days' notice of the same; and to appoint inspectors of election at each place of voting. Returns of all elections were made to the common council, who issued certificates of election to the persons chosen. A plurality of votes was required for election. The elections were not to be held in a "grog-shop or other place where intoxicating liquors were vended," and the polls were to be open one day "from sunrise till sunset."

The duties of the mayor were "to communicate to the common council at least once in each year" a general statement of the condition of the city with reference to its governmental affairs; to recommend to the common council the adoption of such measures as he should deem expedient; "to be vigilant and active in causing the laws and ordinances of the city government to be duly executed and enforced; to exercise a constant supervision and control over the conduct and acts of all subordinate officers; to receive and examine into all such complaints as may be preferred against any of them for violation or neglect of duty, and certify the same to the common council" for their action. The common council had power to declare the office of any person so complained against vacant if the complaint were found to be true.

The recorder was a judicial officer having, within the limits of the city, essentially the same power as a justice of the peace. He had, moreover, jurisdiction over all violations of the city ordinances. The city marshal was a regular attendant upon the Recorder's Court, and under obligation "to execute and return all processes issued by the recorder, or divested to him by any legal authority." The marshal might appoint one or more deputies who should have equal power with himself; he should arrest all persons guilty of a breach of the peace and of violation of the city ordinances, and bring them before the



recorder for trial. He should possess, finally, superintending control of the city police.

The treasurer was required to make out and present to the mayor quarterly "a full and complete statement of the receipts and expenditures of the preceding three months," to be published in a manner to be prescribed by ordinance. The usual oath and bond were required of all city officers before entering upon the duties of their offices, and the mayor, recorder, aldermen and assistant aldermen were required to qualify within three days of their election. The duties of the comptroller, street commissioner, collectors and all other officers whose functions were not laid down in the charter, were to be defined by the common council.

The legislative power was vested in the mayor and the two bodies of the common council. Conspicuous limitations on this power were: 1. That the taxes levied and collected should not exceed one per cent. per annum, upon all property made taxable by law for State purposes; 2. That money borrowed on the faith of the city should "never exceed three times its annual estimated revenues." With respect to all ordinances passed by the common council, the mayor possessed a limited veto which was defined in terms similar to those employed in describing the veto power of the President of the United States. In case of a vacancy in the office of mayor, or in case of the absence or the inability of the mayor, the president of the board of aldermen should exercise the mayor's duties and receive his salary. The mayor might call special sessions of the common council at any time by proclamation, and should state to the members when assembled the purpose for which they had been convened.

In the case of bills appropriating money, imposing taxes, increasing, lessening, or abolishing licenses, or for borrowing money, it was required that the "yeas" and "nays" should be entered on the journals. For the passage of any appropriation bill involving the sum of five hundred dollars or more, and of any bill increasing or diminishing the city

revenue, the vote of a majority of all the members elected was required. All resolutions and ordinances, moreover, calling for the appropriation of any sum of money exceeding fifteen thousand dollars, were required to lie over for ten days and be published for one week in at least one public daily paper. It was unlawful for any member of the common council to be interested in any contract, the expenses of which were to be paid out of the city treasury; and the city itself was not permitted to become the subscriber for stock in any corporation.

In case it should become necessary for the city to use private property for laying out, changing, or improving streets, and no agreement between the owners and the corporation should be possible, the property might be taken on the payment by the city of a sum fixed by a board of five commissioners appointed by the County Court. In any proposition to pave, grade, light, water, or otherwise improve a street, one-third of the owners of the land opposite the proposed improvements making objection, the improvements should not be made. But if the number of the objectors was less than one-third of the owners, the improvements should be made. The initiative in improvements might also be taken by the owners of property opposite which they were desired. They should be made if three-fourths of the owners required them and applied therefor to the common council, provided there were funds in the treasury not otherwise appropriated that might be used for this purpose.

That there might be no conflict of powers, it was provided by a final section of the charter, that all the powers and functions of all officers whatsoever who had hitherto exercised authority in the municipal government of San Francisco should cease and be determined from and after the day on which the officers prescribed by the charter should be duly elected and qualified.

The first election under this charter was held May 1, 1850, at the time the vote was taken for its adoption by the citizens of San Francisco. The following officers were elected:

*Mayor*.—John W. Geary.*Recorder*.—Frank Tilford.*Marshal*.—Malachi Fallon.*City Attorney*.—Thos. H. Holt.*Treasurer*.—Charles G. Scott.*Comptroller*.—Benj. L. Berry.*Tax Collector*.—Wm. M. Irvin.*Street Commissioner*.—Dennis McCarthy.*Aldermen.*Charles Minturn,  
F. W. Macondray,  
D. Gillespie,A. A. Selover,  
Wm. Greene,C. W. Stuart,  
Wm. M. Burgoyne,  
M. L. Mott.*Assistant Aldermen.*A. Bartol,  
C. T. Botts,  
Wm. Sharron,John Maynard,  
John P. Van Ness,L. T. Wilson,  
A. Morris,  
Wm. Corbett.*Assessors.*Robert B. Hampton,  
Holsey Brower,  
John Garvey,John H. Gibson,  
Francis C. Bennett,John P. Haff,  
Beverly Miller,  
Lewis B. Coffin.

Before the end of the following January several changes occurred in the common council. Mr. Burgoyne was never qualified and Mr. Macondray resigned. Their places were filled on the 27th of June by the election of Moses G. Leonard and John Middleton. Of the assistant aldermen, Mr. Maynard and Mr. Botts resigned, and their places were filled by George W. Green and James Grant. Later changes were effected in the board of aldermen by the retirement of Mr. Gillespie and Mr. Leonard, whose places were filled on the 20th of January, 1851, by the election of W. H. V. Cronise and D. G. Robinson. At the time of this last election, George W. Gibbs was chosen to fill a vacancy in the board of assistant aldermen caused by the resignation of Mr. Morris.

The two boards met to organize and appoint committees on the 9th of May, in the City Hall, at the corner of Kearney and Pacific streets. At these meetings a message from the mayor was received and read. The reports of the treasurer and comptroller submitted at this time show the liabilities of the city to have been \$199,174.19, while the assets were \$238,253.00, being an excess of \$39,078.81 over the liabilities.

The new government having been put into operation shortly after the conflagration of May 4, its attention was directed to

the necessity of providing more efficient means for extinguishing fires. To this end an ordinance was passed declaring "that if any person, during a conflagration, should refuse to assist in extinguishing the flames, or in removing goods endangered by fire to a place of safety, he should be fined in a sum not less than five, and not exceeding one hundred dollars." The mayor was authorized "to enter into contracts for digging artesian wells and for the immediate construction of water reservoirs in various parts of the city." Another ordinance passed at an early meeting of the council ordained that every householder should "furnish six water buckets, to be kept always in readiness for use during the occurrence of future fires."

At its first meeting held May 9, 1850, the common council entered upon a scheme for plundering the city treasury in behalf of the members of the government. A bill to fix the salaries of the several city officers was brought forward, discussed, and laid over for subsequent consideration. It was proposed that the mayor, the recorder, the marshal, and the city attorney should receive ten thousand dollars each per annum. The comptroller, the aldermen, and the assistant aldermen were to have six thousand dollars each, while the treasurer was to receive one per cent. of all receipts, and the tax collector three per cent. of all sums collected. This proposition, coupled with an extravagant and unwise license law, awakened a spirit of indignation in the citizens, and "came very near overthrowing the entire city government."<sup>1</sup> Numerous public meetings were held to devise means for putting an end to the disgraceful conduct of the legally constituted authorities. Such a meeting was held in Portsmouth Square, on the evening of June 5, and was attended by several thousand persons. At a previous meeting a committee had been appointed to take into consideration "the acts of the common council upon the subject of taxation and salaries." The committee having canvassed the subject, submitted to the

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<sup>1</sup> *Daily Alta California*, August 14, 1850.



meeting of June 5, the following resolutions which were adopted :

“ *Whereas*, It is customary and proper for the people at all times to assemble and deliberate together upon the acts of their public servants,—and to instruct them when they shall have exceeded their just powers, or imposed unnecessary burdens on the community,—and whereas, the system of oppressive taxation, of high salaries and other impolitic measures, proposed by our present city council, have a sure and certain tendency to retard the growth, to obstruct the commerce, to cripple the industry, and to overload the people of our city,—we, the citizens of San Francisco, in public meeting assembled, do hereby resolve and declare—

“ *Resolved*, That while we duly respect the lawfully constituted authorities of our city, and are willing to pay all proper taxes, to meet the necessary public expenses and improvements, we most earnestly protest against the great and unequal pressure of the present scheme of taxation,—against the high salaries proposed, especially for offices considered in other cities offices of trust and honor, and not of profit,—and against the expenditure of the public funds for purposes never contemplated by the votes of this city.

“ *Resolved*, That in view of the grievance of which we complain, should the scheme of high salaries be carried out by the common council, we shall view their position as antagonistical; and we believe that such an act will call forth a popular dissatisfaction, which will render all taxation difficult; depriving our city of necessary revenue, and still further embarrass our already bankrupt treasury.

“ *Resolved*, That in the opinion of this meeting, the salaries of all the officers of the city should be limited to the least remunerating rates, and that the common council should receive no salary, except, perhaps, a reasonable *per diem* allowance for extra labors in committees, so long as the corporation is unable to supply its pressing wants and pay its honest debts.

“ *Resolved*, That we consider the scale of taxation as proposed and in part established by our city council, not only unjust to all classes, but especially oppressive to the interests of the laboring and poorer classes, and that as hundreds of good citizens are da

arriving in embarrassed circumstances, a heavy tax upon their limited means of honest livelihood is unjust and wrong.

*“Resolved,* That we instruct our mayor and common council to abandon the scheme of high salaries, and to remodel the schedule of oppressive taxation as shadowed forth by their recent actions; and unless they are willing to do so, to resign and give place to more patriotic and efficient men.

*“Resolved,* That a committee of twenty-five be appointed by this meeting to wait upon the common council, with a copy of these resolutions, and request an answer thereto.”

These resolutions were presented to the common council at a meeting of that body, held June 7, by J. L. Fulsom, chairman of the committee of twenty-five. They were read, and, by a vote of the council, laid on the table. Alderman Selover, the mover of this action, contended “that they were insulting and not couched in terms which should entitle them to respect and consideration.” The vote that the resolutions lie indefinitely on the table was not considered such an answer as was due to the great popular assembly represented by the committee of twenty-five. When, therefore, this committee reported to a subsequent meeting in the public square, on the evening of June 12, they were empowered to increase their number to five hundred, and authorized to present the same resolutions to the council in such form as they might think proper. They were instructed, moreover, to report to a meeting of the people to be held on the 17th of June, and at that time to recommend such course of action as they might deem necessary. “The committee thus fortified, afterwards chose the additional members, and fixed the evening of the 14th, when they should all march in procession to the place of meeting of the common council, and there again submit the ‘sovereign will’ of the people to the aldermen, and require their prompt obedience to the same. On that day the great conflagration took place; and further action on the subject of the high salaries and obnoxious taxation ordinances was indefinitely postponed. Popular excitement took a new direc-

tion in consequence of the fire ; and, excepting in the columns of the *Herald* newspaper, and among a few testy individuals, little more was said on the matter till some months afterwards, when the question was revived. The previous meetings, however, had the effect of causing the obnoxious license ordinance to be withdrawn for a time. In the end, the salaries of both the municipal officers and the common council were reduced, the latter being ultimately fixed at four thousand dollars.”<sup>1</sup> The salaries of the other municipal officers ranged from eight thousand to ten thousand dollars.

A charter having been adopted, the city proceeded to take

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<sup>1</sup>The action of the mayor, John W. Geary, in vetoing the ordinance which fixed the salaries of the members of the council at four thousand dollars, “was universally and heartily applauded by the people.” In returning the ordinance to the council, unapproved, he called the attention of members to the inexpediency of their action. “With great unanimity,” he said, among other things, “a financial measure has been adopted to provide for the immediate payment of the city’s indebtedness by means of a loan of half a million of dollars. It is of the greatest importance to the interests of the city that that measure should be made to succeed at the earliest possible moment. In my deliberate judgment its success would be injuriously impeded, if not entirely defeated, by associating with the proposition for a loan, an ordinance to appropriate so large a proportion of the amount demanded as sixty-four thousand dollars, to the payment of a class of officers whose services are usually rendered without any other remuneration than the honor conferred by their fellow-citizens, and their participation in the general good which it is their province and duty to promote. It could not fail to weaken our public credit to show a purpose to use it for the payment of salaries never contemplated by the people, especially in view of the admitted necessity for the practice of the most rigid economy, in order to complete by means of all the resources and credit we possess the public works in progress or in contemplation. With scarcely a dollar in the public treasury—without the means of discharging even the interest falling due for the script already issued—the city credit impaired, and general bankruptcy staring us in the face, retrenchment should be the order of the day, rather than the opening up of new modes of making enormous and heretofore unknown expenditures.” “Annals,” 280–281. The efforts of the citizens to compel economy in the government did not cease with their opposition to the proposed salaries. On the 24th of June D. R. Smith and others petitioned the council “to investigate the conduct of the street commissioner in hiring a mule at twenty-five dollars per day.”

an inventory of its goods. A commission was, therefore, appointed by the common council, consisting of one alderman, one assistant alderman, and one citizen of San Francisco, to ascertain and report to the common council, the extent, description, and condition of all the property belonging to this city, or to the municipality, or pueblo of Yerba Buena, or San Francisco, on the 29th day of April last; and all claims, rights, titles, and interests of said city or pueblo to or in any lands, funds, or property within the corporate limits; and also to ascertain and report upon any right or privilege to which the citizens of San Francisco, or the citizens or inhabitants thereof in common, may be entitled beyond the limits described by the act to incorporate the city of San Francisco.<sup>1</sup>

During its brief and inglorious career, the common council was so completely absorbed in the question of the members' salaries, that the work of organizing the government made only slow progress. It was provided, however, by a joint resolution of the two bodies of the council, that at the beginning of every municipal year certain joint standing committees should be appointed by the council, each board appointing three members of each committee. The committees specified were: 1. on finance; 2. on fire and water; 3. on police, prisons, and health; 4. on streets, wharves, and public buildings; 5. on ordinances; 6. on education; 7. on engrossing; 8. on the judiciary. Each committee was empowered to choose its own chairman by ballot. By another joint resolution of the same date, June 19, 1850, the following method of legislative procedure was established for the council:

"Every ordinance shall have as many readings in each board as the rules of each board may require; after which the question shall be on passing the same to be engrossed, and when the same shall have been passed to be engrossed, it shall be sent to the other board for concurrence; and when such ordinance shall have so passed to be engrossed in each

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<sup>1</sup>Ordinance dated May 30, 1850.



board, the same shall be engrossed by the clerk of that body in which it originated, and examined by the joint engrossing committee, and upon their report the question shall be in each board, upon its final passage; upon its final passage in the concurring board it shall be signed by the president thereof and returned to the board in which it originated. Upon its final passage in the originating board, it shall be signed by the president thereof and transmitted to the mayor, by whom it shall be returned with his signature or objections to the board from whence it came."

During the last half of the year several departments were organized, particularly those for whose efforts there was the most imperative need. The fire department was established by an ordinance passed on the first of July. Companies of at least twenty members having adopted and signed a constitution, might petition the common council for apparatus, house and other articles required. The rules of the department were made by an association composed of two delegates from each company, elected on the first Monday of August each year. The rules thus made were regarded as binding by all companies in the department. It was provided there should be a chief engineer and two assistant engineers. They were elected by the members of the several companies. The chief engineer was president of the board of delegates. It was the duty of the chief engineer, moreover, "to superintend the organization of all fire companies in San Francisco; to examine all engines, hose and apparatus belonging thereto, which the city may wish to purchase; to superintend the erection of engine houses and cisterns; to exercise a general supervision and control over all branches of the fire department of this city; to act in conjunction with the fire committee, on all subjects which may be referred to them; and to protect the engines and apparatus of the city which shall be placed in the houses of private companies."

The chief engineer was required also "to superintend and direct the operations of all companies at fires or conflagra-

tions ; he was given authority, with the consent of the mayor and two members of the common council, to blow up any building or buildings with gunpowder," which he might deem necessary for the suppression of the fire, or to perform such other acts as might be demanded by the emergency. He was required to report the condition of his department at least once in three months, or oftener if demanded. A bond in the sum of ten thousand dollars was required of him, and his salary was to be six thousand dollars per year, payable monthly.

The police department, as organized under the charter of 1850, consisted of a night and a day police "not to exceed seventy-five men, including captains, assistant captains, sergeants of police, and policemen." They were nominated by the city marshal and confirmed by the mayor. Of this department, the marshal was the chief executive officer, and he was held responsible to the common council "for the efficiency, general conduct and good order of the officers and men."

The city was divided into three police districts, in each of which provision was made for one deputy marshal, or police captain, and one assistant captain, and two police sergeants. Each district was divided into as many beats or stations as were deemed necessary and might be approved by the city marshal. The salaries fixed were ten dollars a day for each captain of police ; eight dollars a day for each assistant captain, each sergeant, and each policeman. The salaries were paid semi-monthly by the comptroller through warrants.

The ordinance organizing the street department was approved September 20, 1850, and the department when organized was charged with "opening, regulating, and improving streets, constructing and repairing wharves and piers, digging and building wells and sewers, and the making of public roads, when done by assessment, and all other matters relating to public lands and places, and the assessing and collecting of the amounts required for such expenditures." The work of

the department was distributed among three bureaux: 1. The bureau of assessment and collection; 2. The bureau of surveying and engineering; 3. The bureau of wharves and piers. The chief officer of the department was the street commissioner, who by virtue of his office was one of the surveyors of the city. He was required to execute a bond to the corporation in the sum of ten thousand dollars for the faithful performance of his official duties. He made all contracts for work, and all pecuniary obligations of the city under these contracts were met by warrants of the comptroller, drawn upon the requisition of the commissioner. He was required to indicate to the common council, from time to time, the improvements needed, and present plans for making them; in a word, he was to be the manager of the department. The second general officer was called the clerk to the street commissioner, by whom he was appointed and whom he assisted in all matters pertaining to the street department. He kept accounts in relation to all contracts made, prepared the requisitions upon the comptroller for the amounts due the several contractors, examined all claims against the corporation, and kept a record of assessments. In case of vacancy in the office of street commissioner, the clerk was empowered to act in that capacity until the appointment of a new commissioner.

The officers of the bureau of assessment and collection received their appointment "by nomination of the street commissioner, and election by the common council." They were "charged with the duties of making the estimates and assessments required for all public alterations and improvements ordered by the common council," and of collecting all assessments that had been confirmed by the same body. The collector of assessments, in order to insure the faithful performance of his official duties, was required to "execute a bond to the corporation, with at least two sureties, to be approved by the comptroller, in the final sum of twenty-five thousand dollars."

It was provided that the city and county surveyor should

be the chief officer of the bureau of surveying and engineering. The main functions of this bureau were to assist the street commissioner "in laying out and regulating the streets, roads, wharves and slips of the city." It was, moreover, required to lay out and survey ground for the purpose of building, and to advise and direct all relative matters. No person, in fact, was permitted to build on his own land unless the land had previously been "viewed and laid out by the city or county surveyor, with the advice and consent of the street commissioner," and for these services the city surveyor might demand and receive the fees allowed by the legislature to county surveyors, but whenever he was employed by the street commissioner to make a survey, he was to receive compensation at the rate of sixteen dollars a day. For making a survey for the purpose of regulating and improving a street, he was to "receive at the rate of twenty-five dollars for each hundred feet running measure to be thus improved." For other special surveys, as for building a sewer, specific charges were fixed by the ordinance through which the department was organized.

At the head of the bureau of wharves and piers was the superintendent of wharves, whose duty it was to inspect the condition of the public wharves and piers, to repair those existing, and to superintend the erection of new ones. He was nominated by the street commissioner and appointed by the common council, and his bond to the corporation was in the sum of five thousand dollars. Besides superintending the wharves and piers, he was required to advise with the street commissioner in relation to such improvements as might appear necessary, which, being approved, should be reported to the common council with the commissioner's recommendation. In case, however, the proposed improvements should not involve an expense exceeding four hundred dollars, they might be undertaken by the authority of the street commissioner, by whom alone, as in other cases, all requisitions upon the comptroller for payments should be made.



The office of wharfinger was created December 20, 1850. The incumbent was "to have a general superintendence and control of the wharves belonging to the city." He was subordinated to the street commissioner by whom he was nominated. It was his duty to collect all tolls and money accruing from the use of the wharves; and his compensation was to be twenty per cent. of the gross receipts. He was required to give a bond in the amount of three thousand dollars.

According to the provisions of the charter the city was to be divided by the common council into eight wards. This was done by an ordinance dated November 5, 1850. The first ward embraced that portion of the city east of Stockton and north of Jackson street; the second, that portion west of Stockton and north of Jackson; the third, that portion east of Kearney, between Jackson and Sacramento; the fourth, that portion west of Kearney, between Sacramento and Jackson; the fifth, that portion bounded by Sacramento, Market and Kearney streets; the sixth, all that portion west of Kearney, between Sacramento and Market; the seventh, all that portion south and east of Market, and east of Fourth street; and the eighth, all that portion west of Fourth street and south and east of Market.

The municipal government thus created and organized under the charter of 1850, and the whole political organization to which it belonged, occupied a peculiar and anomalous position. California at that time was simply a conquered region which had not been organized by Congress into either a territory or a State. In this position the people, impelled by the necessities of their circumstances, had adopted a constitution and set up a government which had much likeness to the government of a State in the Union. This government, however, had not been adopted or recognized by the power which alone held the sovereign authority over this region, and whose coöperation with the inhabitants was necessary to the organization of legitimate political institutions. The city charter was, therefore, an act of an unauthorized body, and it

was within the power of the government at Washington to set aside both the charter and the legislative body from which it had proceeded.

The uncertainties of their position led the people of San Francisco to look with eagerness for favorable news from Congress during the months in which the proposition to make California a State was before that body. When the expected tidings finally arrived, on the 18th of October, the inhabitants, to use the language of a contemporary writer, were "half wild with excitement." "Business of almost every description was instantly suspended, the Courts adjourned in the midst of their work, and men rushed from every house into the streets and towards the wharves, to hail the harbinger of the welcome news. When the steamer rounded Clark's Point and came in front of the city, her masts literally covered with flags and signals, a universal shout arose from ten thousand voices on the wharves, in the streets, upon the hills, house-tops, and the world of shipping in the bay. Again and again were huzzas repeated, adding more and more every moment to the intense excitement and unprecedented enthusiasm. Every public place was soon crowded with eager seekers after the particulars of the news, and the first papers issued an hour after the appearance of the *Oregon* were sold by the newsboys at from one to five dollars each. The enthusiasm increased as the day advanced. Flags of every nation were run up on a thousand masts and peaks and staffs, and a couple of large guns placed upon the plaza were constantly discharged. At night every public thoroughfare was crowded with the rejoicing populace. Almost every large building, all the public saloons and places of amusement were brilliantly illuminated—music from a hundred bands assisted the excitement—numerous balls and parties were hastily got up—bonfires blazed upon the hills, and rockets were incessantly thrown into the air, until the dawn of the following day."<sup>1</sup>

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<sup>1</sup> "Annals," 293.

In what manner the common council had contributed to the cause of this public rejoicing does not appear; measures were taken, however, through which each member was to receive, nominally as a present from the city, a gold medal, of the value of one hundred and fifty dollars, commemorative of the admission of California to the Union. This scheme, the responsibility for which it was difficult to fix, following as it did on the heels of other manifestations of inordinate greed displayed by the city government, aroused public inquiries as to what services had been rendered by the council that were not adequately covered by their enormous salaries. The outcry that was raised against the project prevented its execution, and the councilmen who received the medals became willing to pay for them, in order that they might hide them as quickly as possible in the melting pot. But even this action did not free them from the imputation of having planned to award themselves costly decorations to be provided from the funds of the city treasury.

That the municipal government was in disreputable hands become apparent very early, and every succeeding month brought forth new evidence of the lamentable fact. During the year 1850, San Francisco had unquestionably improved in appearance. It had grown from a "mass of low wooden huts and tents" to be a city "in great part built of brick houses, with pretty stores; and the streets—formerly covered with mud and water—floored throughout with thick and dry planks."<sup>1</sup> But honesty and efficiency were wanting in the administration of its affairs. The courts were corrupt, and already there were manifestations of that sentiment which found expression in the vigilance committee of the following year. The government appeared to have brought the municipality a long way on the road to financial ruin. On the 25th of March, the editor of the *Daily Alta California* wrote:

"If any other city has had the singular fortune to run in

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<sup>1</sup>Gerstaecker, "Journey," 243.

debt so deeply in so short a period as San Francisco, we have never heard of it. If any other city has incurred debt so wantonly, without ever considering the means of payment, or making any provision for sustaining its credit, it has not been in our day. Here is a city not three years old, with a population of perhaps 25,000 people owing already one million of dollars, and looking forward with the intensest satisfaction to an accumulating interest of 36 per cent. per annum."

A remedy for the serious ills that had fallen upon the city appeared to lie in the adoption of a new charter, and in the election of a new list of municipal officers. A new charter was clearly needed, not merely because the existing one was a carelessly constructed instrument, but also because it lacked the requisite authority. In order, therefore, to supply the evident deficiencies, the first legislature convened after the admission of California to the Union re-incorporated the city of San Francisco by an act passed on the 15th of April, 1851.

The charter of 1851 retained all the essential forms of the pre-existing government; it differed from that of the previous year in its more careful definition of the functions of the several departments, particularly in its specifications as to financial management. The southern and western boundaries of the city alone were changed. The former was kept parallel to Clay street, but was placed two miles and a half instead of, as formerly, two miles from the centre of Portsmouth square. The western line was placed at a distance of two miles, instead of a mile and a half from the same point, and remained, as formerly, parallel to Kearney street. The existing division of the city into eight wards was adopted, but it was provided that the common council should, "at least three months before the general election of 1852, and also during the second year thereafter redistrict the city, so that each ward" should contain approximately the same number of inhabitants. Instead of the two assessors from each ward provided for by the previous charter, it was here determined that there should be elected annually three for the whole city by a general ticket.



In the charter of 1850, it was provided that of the whole number of sixteen assessors only eight should be elected for the first year, while in that of 1851, it was specified that for the first year only two should be elected.

On the transaction of business by the council, the second charter imposed restrictions unknown to the first. Under the first charter a majority of the members elected constituted a quorum, and an ordinance might be passed by a majority of the members present, which might mean by a majority of a simple quorum. The ayes and nays were taken and entered on the journal only as they might be called for by one or more members; whereas under the second charter no ordinance or resolution could "be passed unless by a majority of all the members elected to each board. On the final passage of every ordinance or resolution ayes and nays shall be taken and entered upon the journal." But in its financial dealings, the council was most completely hedged about, as may be seen from several sections of the third article:

"Every ordinance providing for any specific improvement, the creation of any office, or the granting of any privilege, or involving the sale, lease, or other appropriation of public property, or the expenditure of public moneys (except for sums less than five hundred dollars), or laying any tax or assessment, and every ordinance imposing a new duty or penalty shall, after its passage by either board, and before being sent to the other, be published with the ayes and nays in some city newspaper, and no ordinance or resolution, which shall have passed one board shall be acted upon by the other on the same day, unless by unanimous consent" (Art. III, sec. 4).

With reference to municipal debts, the first charter authorized the common council "to borrow money and pledge the faith of the city therefor, provided the aggregate amount of the debts of the city shall never exceed three times its annual estimated revenues." Notwithstanding the unequivocal limitations of this provision, it was not observed. The debts created by the

council of 1850 were more than three times the amount of the annual revenues. In the second charter the line of restriction was more closely drawn. The council could not "create, nor permit to accrue, any debts or liabilities which, in the aggregate with all former debts or liabilities, shall exceed the sum of fifty thousand dollars over and above the annual revenue of the city, unless the same shall be authorized by ordinance for some specific object, which ordinance shall provide ways and means, exclusive of loans, for the payment of the interest thereon as it falls due, and also to pay and discharge the principal within twelve years." To make the security still greater, the principle of *referendum* was here applied, it being determined that this ordinance should not take effect until it had been submitted to the people and received a majority of all the votes cast; and the money thus raised could be used only for the object mentioned in the ordinance, or for the payment of the debt thereby created. It was, however, provided that the existing city debt, with the interest accruing thereon, should make no part of the fifty thousand dollars specified. The council, furthermore, had no power to borrow money unless it should "by ordinance direct the same in anticipation of the revenue for the current year, and should provide in the ordinance for repaying the same out of such revenue;" nor in such case could the sum borrowed exceed fifty thousand dollars. A larger sum might, however, be raised by loan for the purpose of extinguishing the existing liabilities of the city, whenever the ordinance providing for the same should have first been approved by the electors of the city at a general election. On such a loan the yearly rate of interest should not exceed ten per cent., and the whole should be payable within twenty years.

The financial activity of the council was further circumscribed by the prohibition "to emit bills of credit or to issue or put in circulation any paper or device as a representative of value or evidence of indebtedness, to award damage for the non-performance or failure on their part of any contract, to

loan the credit of the city, to subscribe to the stock of any association or corporation, or to increase the funded debt of the city unless the ordinance for that purpose were first approved by the people at a general election." With respect to taxation, both charters contained the same provision, limiting the amount that might be imposed by the council to one per cent. a year of the assessed value of the property. This was not an absolute limitation, for the council had power to raise, by tax, any amount of money that it might deem expedient, whenever the ordinance for that purpose had been approved by the people. That there would be occasion for exercising this extraordinary power appeared probable in view of the enormous debt that had been thrust upon the city, and of the rapidly increasing need of public improvements. Yet in spite of the pressing demand for money for current uses, the second charter definitely set aside certain revenues to constitute a sinking fund for the payment of the city debt. As long as the debt remained uncanceled, the funds accruing from these revenues could be used for no other purpose. These revenues were: 1. The net proceeds of all sales of real estate belonging, or that may hereafter belong, to the city; 2. The net proceeds of all bonds and mortgages payable to the city; 3. Receipts "for occupation of private wharves, basins, and piers;" 4. Receipts for wharfage, rents, and tolls. To prevent the common council from voting such extravagant salaries as had been paid to the city officers under the first charter, it was provided that the several officers under this charter should "receive for their services out of the city treasury, a compensation to be fixed by ordinance, not to exceed four thousand dollars a year." The treasurer, however, might "receive in lieu of salary not to exceed one half of one per cent. on all moneys received, paid out, and accounted for by him, and the collector not to exceed one per cent. on all moneys collected and paid over." The mayor's and recorder's clerks should receive not over two thousand dollars a year, the clerk of the board of aldermen not over twelve hundred dollars,

and the assessor not over fifteen hundred dollars. The members of the common council were prohibited from receiving any compensation for their services.

These provisions regarding the management of the municipal finances are here set forth prominently, because, as already suggested, they constitute the main points of difference between the two charters. The adoption of the second charter and the election of the officers provided for in it, were the last steps in the establishment, under the authority of the United States, of a legitimate municipal government in San Francisco. The election occurred on Monday, the 28th of April, 1851. On the evening of May 3, the two boards of the common council met in joint convention to examine the returns, and report to the mayor the result of the election. The examination having been made, the mayor was instructed by vote to notify the gentlemen named of their election, and they were requested to meet in the City Hall and take the oath of office. On the same evening the common council adjourned *sine die*, and thus ended its disgraceful career.





IV

MUNICIPAL HISTORY  
OF  
NEW ORLEANS



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor.

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History is past Politics and Politics present History—*Freeman*.

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SEVENTH SERIES

IV

MUNICIPAL HISTORY  
OF  
NEW ORLEANS

BY WILLIAM W. HOWE

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BALTIMORE  
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## MUNICIPAL HISTORY OF NEW ORLEANS.

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### I.

For nearly two centuries after the discovery of America, the Mississippi River remained almost unknown ; and it was not until the year 1682 that LaSalle picked his perilous path from Canada by the way of Lake Michigan and the Illinois, and descended the great stream to its mouth. He was exploring under the patronage of Louis Fourteenth, and gave the name of Louisiana to the vast valley.

The first permanent settlement made by the French in this new domain was established at Biloxi, now in the State of Mississippi, which was founded by Iberville in 1699, and was the chief town of the colony until 1702, when Bienville moved headquarters to the Mobile River. The soil in the neighborhood of Biloxi is sandy and sterile and the settlers depended mainly on supplies from France and St. Domingo. The French Government, distant and necessarily ignorant of the details of pioneer life, sent instructions to search for gold and pearls. The wool of buffaloes was also pointed out to the colonial officials as the future staple commodity of the country, and they were directed to have a number of these animals penned and tamed.<sup>1</sup> It is hardly necessary to say that but little profit was ever realized from the search for gold and pearls, or from the shearing of buffaloes.

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<sup>1</sup> Martin's History of Louisiana, chap. 7.

In 1712 the entire commerce of Louisiana, with a considerable control in its government, was granted by charter to Anthony Crozat, an eminent French merchant. The territory is described in this charter as that possessed by the Crown between Old and New Mexico, and Carolina, and all the settlements, ports, roads and rivers therein, principally the port and road of Dauphine Island, formerly called Massacre Island, the river St. Louis, previously called the Mississippi, from the Sea to the Illinois, the river St. Philip, previously called the Missouri, the river St. Jerome, previously called the Wabash, with all the lands, lakes and rivers mediately or immediately draining into any part of the river St. Louis or Mississippi. The territory thus described was to be and remain included under the style of the government of Louisiana, and to be a dependency of the government of New France to which it was subordinated. By another provision of this charter, the laws, edicts and ordinances of the realm and the Custom of Paris were extended to Louisiana.

The grant to Crozat, which seemed so magnificent on paper, extending as it did from the Alleghenies to the Rocky Mountains, and from the Rio Grande and the Gulf to the far Northwest, proved of little use or value to him, and of little benefit to the colony; and in 1718 he surrendered the privilege. In the same year the charter of the Western or Mississippi Company was registered in the Parliament of Paris. The history of this scheme, with which John Law was connected, is well known. The exclusive commerce of Louisiana was granted to the Company for twenty-five years, and a monopoly of the beaver trade of Canada, together with other extraordinary privileges; and it entered at once on its new domain. Bienville was again appointed Governor. He had become satisfied that the chief city of the colony ought to be established on the Mississippi, and so in 1718 the site of New Orleans was selected. Its location was plainly determined by the fact that it lies between the River and Lake Ponchartrain, with the Bayou St. John and the Bayou Sauvage or Gentilly

affording navigation for a large part of the distance from the lake towards the river. And even at this early day there was a plan of constructing jetties at the mouth of the Mississippi and so making New Orleans the deep water port of the Gulf. Pauger, the engineer, reported a plan for removing the bar at the entrance of one of the passes, by the same system in principle as the one recently and successfully adopted by Mr. James B. Eads under the Act of Congress of 1875.<sup>1</sup>

Le Page du Pratz visited the place during the same year, and took up a plantation on the Bayou St. John, "a short half league from the site of the Capital," which he says was "then marked only by a shed covered with leaves of latanier," the building, such as it was, being occupied by the Commandant of the Post.<sup>2</sup>

The seat of government was finally removed to New Orleans in August, 1722, and when Charlevoix visited the place, in December, 1723, it contained about one hundred houses, mostly cabins. The well-known map of 1728 shows the town protected by a levee and laid off in rectangular form, having eleven squares front on the river by a depth of six squares.

In 1732 the Western Company surrendered its grant. In 1763 a secret treaty was signed at Paris by which France ceded to Spain all that portion of Louisiana which lay west of the Mississippi together with the City of New Orleans, "and the Island on which it stands." The war between England, France and Spain was terminated by the treaty of Paris in February, 1764. By the terms of this treaty the boundary between the French and British possessions in North America was fixed by a line drawn along the middle of the River Mississippi from its source to the River Iberville and thence by a line in the middle of that stream and of lakes Maurepas and Ponchartrain to the Sea. France ceded to Great Britain the River and Port of Mobile and everything

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<sup>1</sup> Statutes at large, Vol. 18, p. 463.

<sup>2</sup> Hist. de la Louis., tom. 1, p. 83.



she had possessed on the left bank of the Mississippi except the town of New Orleans and the Island on which it stood. As all that part of Louisiana not thus ceded to Great Britain had been already transferred to Spain, it followed that France had now parted with the last inch of soil she had owned on the Continent of North America.

From its foundation up to this date New Orleans was governed by the Superior Council, a body which had general control of the colony, but at the same time took special charge of the administration and police of the Capital. This council had been first established under Crozat, in 1712, by royal edict with powers equivalent to those of similar bodies in St. Domingo and Martinique, and consisted of the governor and commissary ordonnateur; its existence being limited to three years from the day of its first meeting. In September, 1716, it was reorganized by a perpetual edict and composed of the governor general and intendant of New France, the governor of Louisiana, a senior counsellor, the King's lieutenant, two puisné counsellors, an attorney general and a clerk. The edict gave to the council all the powers exercised by similar bodies in the other colonies. Its sessions were directed to be held monthly. One of its most important functions was judicial, for it determined all cases, civil and criminal, in the last resort. In civil cases three members constituted a quorum, in criminal cases five. There was a possibility of popular representation in the provision that, in the absence and lawful excuse of members, a quorum might be completed by calling in notables.

The transfer of the colony to the Western Company called for another change in the organization of the Council; and by an edict of September 1719 it was made to consist of such directors of that Company as might be in the provinces, together with the commandant general, a senior counsellor, the two King's lieutenants, three other counsellors, an attorney general and a clerk.

On the surrender of the charter of the Western Company in 1732, the Council was again remodeled by royal letters

patent of May 7th. The members were declared to be the governor general of New France, the governor and commissary of Louisiana, the King's lieutenant, the town mayor of New Orleans, six counsellors, an attorney general and a clerk. In August, 1742, the increase of trade had caused such an increase of litigation that it was deemed necessary to add to the judicial force; and accordingly by royal letters patent the commissary ordonnateur was directed to appoint four assessors to serve for a period of four years,—their duties being to report in cases referred to them, or to sit when they were required to complete a quorum or to break the dead-lock of a tie vote.

Under such a régime New Orleans was hardly a municipal corporation in any English or American sense. It certainly had at that time no municipal charter. It resembled in some respects a commune, and has been alluded to by the Supreme Court of Louisiana as having been at that time a city.<sup>1</sup>

## II.

The French inhabitants of the colony were astonished and shocked when they found themselves suddenly transferred to Spanish domination, and a majority of the Superior Council undertook in their official capacity to organize an opposition to the Cession and to order away the Spanish Governor, Antonio de Ulloa. But the power of Spain, though moving with proverbial slowness, was roused at last; and in 1769 Alexander O'Reilly, the commandant of a large Spanish force, arrived and reduced the province to actual possession. The leaders in the movement against Ulloa, to the number of five, were tried, convicted and shot. Another was killed in a struggle with his guards. Six others were sentenced to imprisonment, and the seditious documents of the Superior Council were burned on the Place d'Armes.

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<sup>1</sup> 3 Annual Rep., 305.

On the 21st of November, 1769, a proclamation from O'Reilly announced that, inasmuch as the Superior Council had encouraged this insurrection, it had become necessary to abolish the body, and to establish in Louisiana that form of government and mode of administering justice prescribed by those laws which had so long maintained peace and contentment in the American colonies of the Catholic King. In the place, therefore, of the Council, a Cabildo was established, over which the governor himself would preside in person, and which was composed of six perpetual regidores, two ordinary alcaldes, an attorney general syndic and a clerk.

The offices of Perpetual Regidor and Clerk were acquired by purchase and were in the first instance offered at auction. The purchaser had the right to transfer his office by resignation in favor of a known and capable person. One half of the price of the first transfer and one third of each successive one went to the royal treasury. Of these regidores or rulers, the first was Alfarez Real, or royal standard bearer; the second was Alcalde Mayor Provincial, a magistrate with jurisdiction over offences in the rural districts; the third was Alguazil Mayor, a civil and criminal sheriff; the fourth was Depositario General, or government store-keeper; the fifth was Recibedor de Penas de Camara, or receiver of fines, while the sixth merely held his seat in the Cabildo without special official duties.

The ordinary Alcaldes and Attorney General Syndic were chosen by the Cabildo itself on the first day of every year, and were required to be residents and householders of the town. In the absence of the unanimous vote they could not be re-elected until they had been out of office for the space of two years respectively.

The ordinary Alcaldes were individually judges within the city in civil and criminal cases where the defendant did not possess and plead the right to be tried by a military judge, *fuero militar*, or by an ecclesiastical court, *fuero ecclesiastico*. In cases where the matter in dispute did not exceed twenty dollars, they proceeded summarily at chambers, and without

written record. In other cases a record was made up by a notary, the case was heard in open court, and where the matter in dispute exceeded ninety thousand maravedis (\$330.88), an appeal lay to the Cabildo itself. That body did not undertake as such, to examine the case but selected two regidores, who, with the Alcaldes who had heard the cause below, reviewed the proceedings.

The Attorney General Syndic was not, as his title might seem to indicate, the public prosecutor. He appears to have been, in his way, a tribune of the people, though not chosen by them. It was his duty to propose to the Cabildo such measures as the popular interest required and to defend the popular rights.

O'Reilly presided over the first session of the Cabildo in December, 1769, and then yielded the chair to Unzaga, who had been commissioned as governor, with the understanding that he should not assume the duties of the position until the captain-general should request him to do so.

Beyond the limits of the town, in each rural parish, an officer of the army or of the militia was stationed, and acted both as military commandant and chief civil officer. But the city was governed by the Cabildo, and such continued to be its municipal administration during the Spanish rule.

By a proclamation of February 22, 1770, the captain-general created and assigned to the City of New Orleans a special revenue. It consisted of an annual tax of forty dollars on every tavern, billiard table and coffee house, and of twenty dollars on every boarding house; an impost of one dollar on every barrel of brandy brought to the city, and a tax of three hundred and seventy dollars on the butchers of the place. To enable the city to keep up the levee, an anchorage duty was also established in its favor, of six dollars upon every vessel of two hundred tons and upwards, and three dollars on smaller craft. These exactions were not exorbitant, but they were the seed of a system which has since become extensive and vicious. New Orleans to-day is exacting large sums in the way of



license taxes on pursuits which require no police regulation, and in the guise of wharf dues which are really a tax on commerce. The germs thus sown in Spanish times have grown like the mustard tree of Scripture, and require vigorous uprooting. In connection with the subject of revenue it may be noted that New Orleans suffered greatly during the Spanish domination from restrictions on the freedom of trade. The colonial theories of Spain with respect to commerce were of the most benighted character, and it may be stated as a general rule that it was only by evasions of law that the trade of New Orleans was permitted to grow.

In 1779 war was declared by Spain against Great Britain and New Orleans was thus called upon to assist the American colonies in their struggle for independence. The youthful and brilliant Galvez received a commission of governor and intendant, and took the field at once with an army of about fourteen hundred men, made up of his regular troops, the militia, a number of Americans of the city who volunteered their services, and "many of the people of color."<sup>1</sup> By the last of September he had captured Fort Bute on Manchac, and Baton Rouge, Fort Panmure at Natchez, and small posts on the Amite and Thompson's Creek. The campaign seems to have had a literary as well as a military result. Julien Poydras, afterwards a member of the Congress of the United States, celebrated its successes in a small French poem which was printed at the royal charge. In May, 1781, Galvez captured Pensacola and the province of West Florida was surrendered to Spain.

On October 1, 1800, a treaty was concluded between France and Spain by which the latter promised to restore the province of Louisiana. France, however, did not receive formal possession until November 30th, 1803, when, in the presence of the officers of both nations the Spanish flag was lowered, the tri-color hoisted and delivery made to France.

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<sup>1</sup> Martin: Vol. 2, p. 48.

The French commissioner, Laussat, had come as colonial prefect, and issued a very rhetorical proclamation congratulating the people upon their return to the bosom of France, and had received in reply an address from the prominent citizens declaring that no spectacle could be more affecting than such return. The joy, however, was of brief duration. The cession to France had been procured by Napoleon, and he did not deem it politic to retain such a distant and exposed domain; and already in April 1803, Louisiana had been ceded to the United States. On the 20th of December 1803, Governor Claiborne took formal possession for the United States, and "the tri-color made room for the striped banner under repeated peals of artillery and musketry."<sup>1</sup>

In the meantime, however, Laussat had by proclamation established a municipal government for New Orleans, in place of the *Cabildo*.<sup>2</sup> It was composed of a Mayor, and two Adjuncts, and ten members of the Council. The names are familiar in our earlier history. Boré was mayor; his associates were Destrehan and Sauv  ; the members were Livaudais, Cavelier, Viller  , Jones, Fortier, Donaldson, Fauri  , Allard, Tureaud, and Watkins. Derbigny was secretary and Labatut treasurer.

### III.

As stated by the Supreme Court of Louisiana,<sup>3</sup> New Orleans, which had been "a city under the royal governments of France and Spain was created a municipality under the ephemeral dominion of the Consulate." Under the American domination the new territorial Legislature deemed it proper to establish its political organization by a charter of the American type, and this was done in February, 1805. The Court finds in the decision above referred to, that "the act to incorporate

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<sup>1</sup> Martin: Vol. 2, p. 199.

<sup>2</sup> Id., p. 197.

<sup>3</sup> Louisiana State Bank *vs.* Orleans Nav. Co., 3rd Annual Rep., 305.

the City of New Orleans of the 17th of February of that year, like all the statutes passed at the commencement of the American government of Louisiana—to the honor of their authors be it said—is a model of legislative style and exhibits its intendment with a clearness and precision which renders it impossible to be misunderstood. It provides for the civil government of the city and in general terms confers powers of administration; and in the various special delegations of authority it contains thereby excludes the idea of any other powers being granted than such as the police and the preservation of good order of the population require. \* \* \* It prescribes the duties of the principal officers and designates specially the objects for which money may be raised by taxation, as well as the objects of taxation. The whole tenor of the act is a delegation of power for purposes of municipal administration, guarded by limitations, and accompanied by such checks as experience had shown to be wise, expedient and even necessary for the interest of those who were to be affected by it.”

The officers under this charter were a Mayor, a Recorder, a Treasurer, and a number of subordinate officers, and the Council was composed of fourteen Aldermen. Two from each of the seven wards into which the city was divided. The Mayor and Recorder were at first appointed by the Governor of the territory but the officers were afterward made elective. The Aldermen were required to be “discreet” inhabitants of and free holders in their respective wards, and were elected in each ward by voters who, to be qualified, were required to be free white male inhabitants who should have resided in the city for at least one year, and should have been for at least six months free-holders possessing and owning a real estate worth at least five hundred dollars, or renting a household tenement of the yearly value of one hundred dollars. By an amendment of 1812, the Aldermen were required to be “of good fame and possessed of property in their respective wards,” and the Mayor, thenceforth to be elected, to have had a resi-

dence in the city for the four years preceding his election, and to possess in his own name for the last year in the city a real estate of three thousand dollars, agreeably to the tax list. The voters under this amendment were required to have paid a State, parish or corporation tax, or to have possessed for six months a real estate of the value of five hundred dollars conformably to the tax list. By an amendment of 1818, the right to vote for municipal officers was extended to all free white male citizens of the United States of the age of twenty-one years who had resided in the city and in the ward for six months next preceding the election and who had paid a State tax within the year preceding the election.

By this charter of 1805 all rights and property which had belonged to the City of New Orleans, or had been held for its use by the Cabildo under the Spanish government, or by the municipality after the transfer of the province in the year 1803 to France, or to the municipality at the moment, and which had not been legally alienated, lost or barred, were vested in the Mayor, Aldermen and inhabitants.<sup>1</sup>

In 1836 another charter was imposed by the State Legislature. It was undoubtedly procured as a result of differences of opinion as to municipal methods between the Creoles of the old régime and the rapidly increasing American population of Anglo-Saxon origin. It was a curious experiment in city affairs. The territory of New Orleans was divided into three separate municipalities, each having a distinct government with many independent powers; yet with a Mayor and General Council with a certain superior authority.<sup>2</sup> It was the idea of local self-government pushed to an extreme. It existed for sixteen years, and during its existence many important public improvements were made. At the same time the system afforded many opportunities for corruption and extravagance. Large floating debts were contracted and

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<sup>1</sup> Acts of 1805, p. 64.

<sup>2</sup> Acts of 1836, p. 28.



it appeared to all that some reform must be effected. In 1852, by legislation of that session, the three municipalities, together with the City of Lafayette, lying next above New Orleans, were consolidated by a new charter; and stringent provisions made for the funding of the debt. An interesting discussion of this charter, with respect to the bonded debt, is found in a decision of the Supreme Court of the United States rendered in 1881.<sup>1</sup> By this charter, and its supplemental act,<sup>2</sup> the legislative power of the new corporation was vested in two bodies, a Board of Aldermen and a Board of Assistant Aldermen, and its executive power in a Mayor, four Recorders, a Treasurer, a Comptroller, a Surveyor, a Street Commissioner, and such subordinate officers as the Council might deem necessary. The debt was funded, and in 1855 it was reported that obligations of \$7,700,000 had been reduced to but little more than \$3,000,000.

In 1856 the charter was amended and re-enacted, and elaborate provisions made in regard to assessment and taxation, and under this legislation the corporation continued until the year 1870.

#### IV.

In the meantime the Civil War came on; and upon the capture of New Orleans by the forces of the United States, in May, 1862, the administration of the affairs of the city became the subject of military action. No change could be made at the time in existing legislation. A military Mayor was detailed to perform the duties of that office; and such affairs of the city as required attention during a complete military occupation were entrusted to the Finance Committee and the Committee of Streets and Landings of the Council. As a matter of course the administration of a large city under such circumstances and by such means, under military control, gave

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<sup>1</sup> *Louisiana vs. Pilsbury*, 105 U. S. Reports, 278.

<sup>2</sup> Acts of 1852, pp. 42-57.

rise to many singular questions. For an investigation of some of them the reader is referred to the decisions of the Supreme Court of the United States which are cited in the subjoined note.<sup>1</sup>

The discussion, however, of such controversies cannot throw much light on the problem of municipal government in times of peace. But it may be suggested that the promptness and efficiency of military action in matters of police and sanitation in New Orleans, during the late war, were a valuable object lesson, and furnish some of those compensations which, Mr. Emerson declared, always accompany calamity.

The year 1870 witnessed an experiment in municipal government in New Orleans which deserves special mention. The charter enacted in that year by the Legislature,<sup>2</sup> adopted what was generally known as the Administration system. The limits of the city were considerably enlarged by including what is now known as the sixth district, and was formerly Jefferson City, and the government of the municipality thus established was vested in a Mayor and seven Administrators; namely, one of Finance, one of Commerce, one of Improvements, one of Assessments, one of Police, who was ex-officio a member of the Police Board; one of Public Accounts, and one of Water-works and Public Buildings. These officials in the first place possessed administrative and executive functions corresponding to their names; and each of the seven was accordingly at the head of a bureau or department created for him by the statute as follows: a Department of Finance, which was the city treasury; a Department of Commerce which had general superintendence of all matters relating to markets, railroads, canals, weights and measures, the fire department and manufactories; a Department of Assessment, with general superintendence of all matters of taxation and license; a Department

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<sup>1</sup> *New Orleans vs. The Steamship Co.*, 20 Wallace, 387; *The Venice*, 2 Id., 259; *Grapeshot*, 9 Id., 129; *Mechanics, etc. vs. Union Bank*, 22 Id., 276.

<sup>2</sup> Acts of 1870, extra session, No. 7.

of Improvements charged with the construction, cleansing and repair of streets, sidewalks, wharves, bridges and drains; a Department of Police having charge of public order, houses of refuge and correction, and the lighting of the city; a Department of Public Accounts which comprised all the duties of an Auditor and Comptroller; and, finally, a Department of Water-works and Public Buildings, with supervision of water-works, school-houses, hospitals and asylums.

But in the second place it was provided that the same Mayor and Administrators should form the Council and in a collective capacity should have extensive legislative power for local purposes. In this capacity it resembles the Spanish *Cabildo*. Such a Council possessed naturally many valuable qualities. Its members were elected on a general ticket and were not supposed to represent any local clique. In the exercise of their administrative duties they became familiar with the need of their respective departments and could advocate, explain or defend on the floor of the City Legislature what was desired or had been done in the bureau. A small and compact body, its meetings were as business-like as those of a bank directory. Its custom was to assemble in the Mayor's parlor, generally on the day before the regular weekly meeting; and sitting in committee of the whole, to discuss with any citizens who chose to attend, such subjects of public interest as might be brought up. Reporters from the daily press were present, and the journals of the next morning gave full particulars of the interchange of ideas. If the subject seemed very important and difficult, leading citizens were invited by letter or advertisement to attend and give their views. As an example of thorough discussion it may be mentioned that an ordinance in relation to sewerage and drainage which was proposed in 1881, was debated for upwards of one year, and a hearing given to every friend or opponent who desired to express his views.

No system of government can pretend to be perfect; and the charter of 1870 could not satisfy every one. It was

claimed that the Council under the charter was too small and could be too easily controlled in the interests of private or corporate gain. No preponderant evidence, however, of this assertion ever appeared. The administrators as a rule, were citizens prominent either in business or politics, and as such were far more amenable to public opinion than the ordinary councilman of the average American city. Their methods were essentially business-like and their legislation as a whole was characterized by public spirit and progress.

It is a matter of regret that the administration system could not have been continued longer than it was, but after the adoption of a new State constitution in 1879 a powerful pressure for a complete change was established by local politicians. The Legislature accordingly, in June, 1882, adopted the present charter of New Orleans.<sup>1</sup> The City of Carrollton had already, in 1874, been annexed,<sup>2</sup> and the limits of the existing municipality are therefore very extensive.

By this charter the legislative power of the corporation is vested in one Council composed of thirty members elected by the qualified voters of their respective districts. They must be citizens of the State not less than twenty-five years of age; must be residents of the districts they represent; and must have been residents of the city for five years next preceding their election.

The executive power is vested in a Mayor, a Treasurer, a Comptroller, a Commissioner of Public Works, and a Commissioner of Police and Public Buildings, who are elected on a general ticket. These officers must be at least twenty-five years of age, except the Mayor, who must be at least thirty, citizens of the State and residents of New Orleans for five years next preceding their election. The Mayor presides at the meeting of the Council; and the other executive officers of the city mentioned above have a right to seats on the floor

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<sup>1</sup> Acts of 1882, No. 20.

<sup>2</sup> Acts of 1874, No. 71.



of the Council during its sessions, with a right to debate and discuss all matters having reference to their respective departments, but without a vote. This is a valuable provision, and if executed in good faith cannot but produce a beneficial effect.

The executive officers above named may be impeached and removed by the Council for malfeasance or gross neglect of duty, or disability affecting fitness to hold office. Articles of impeachment may be preferred by the Committee of Public Order (who in this case on the trial will be recused), or by six members of the Council, or by twenty citizens.

Some check on hasty legislation is imposed, firstly, by the usual veto power in the Mayor, and secondly, by the provision that "no ordinance or resolution shall pass the Council at the same session at which it is first offered, but any ordinance or resolution shall at its first offering be read in full and shall lie over one week before being finally considered by the Council."

The Fire Department of New Orleans is still of a volunteer character. It is organized as a charitable association, and naturally retains many of the sentiments and traditions which have become obsolete in other American cities, where the paid system has been introduced as a part of municipal government. It has an existing contract with the city for the extinguishment of fires which has yet some two years to run. It is not likely that this contract will be renewed. The city has become so large that while the Firemen's Charitable Association is theoretically composed of volunteers, it is obliged to pay a large number of regular employes in the care of the engine houses and horses, and the use of the steam engines and other apparatus which have superseded the simple appliances of earlier years. The press is agitating for a paid, governmental system. It is alleged that the voluntary system has been used as a political machine in local and even in State politics, that it is cumbrous and costly, and that the time for its usefulness has past. The paid members of the association

will make no objection to being transferred to municipal control, and such transfer will probably be made as soon as it can be done without impairing contract rights.

The topography of New Orleans gives constant and pressing importance to questions of levees, drainage and paving. Large expenditures have been made in this direction during the last half century. The trouble in these matters, as in most of our American cities, has been to secure some system that should be continuous, consistent, and rightly administered. The soil of the entire city is alluvial, and the fall, such as it is, is from the Mississippi towards Lakes Ponchartrain and Borgne. To pave such a soil in such a way as to form a surface that will sustain heavy traffic, during winter rains, is a problem of difficulty. For business streets, square blocks of granite are found to last longer than any other material. Some of the principal avenues have been asphalted on a foundation of concrete. Others have been laid with from nine to twelve inches of gravel which is claimed to possess concreting qualities, and is in some instances laid on a foundation of cypress planks which are expected to resist decay until the needful arch is formed above them.

What is specially needed now is a system by which the work on the levees, the drainage and the paving of the city shall be harmonized, and continued without interruption until it shall be completed in a manner worthy of the place. The legislative committee of the Council has within the last week<sup>1</sup> prepared an act on this subject which the Council has approved and requested the State Legislature to adopt. It establishes a Commission of Public Works in the City of New Orleans, composed of the Mayor and Commissioner of Public Works, of the chairmen of five standing committees of the Council on such subjects, and of six citizens to be selected from different districts of the city. The matter of levees, paving and drainage is to be entrusted to this Commis-

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<sup>1</sup> June, 1888.

sion, certain funds of the city are to be turned over to it, and it is empowered to submit to a vote of property taxpayers the question of a special tax for its further revenue under a constitutional provision which will be presently referred to. If this legislation be adopted it may lay a foundation of permanent and consistent improvements.

The water supply of New Orleans is drawn from the Mississippi River and is in the hands of a Company, in which, however, the city has some stock and a representation on the board of direction. The first company was incorporated in 1833, as the Commercial Bank, at a time when it was the fashion to charter banks with a power to do something quite irrelevant to the operations of finance. By a provision of the charter the city had the right to purchase the works at any time after the lapse of thirty-five years. This right was exercised in 1869, and bonds issued for the amount of the appraisement. The city operated the system until 1877, when, being in default in the interest on the bonds as well as on the rest of her funded debt, it was deemed wise to put the concern in the hands of a business corporation. This change was effected under the Act of March 31, 1877, the bonds given in 1869 being mostly exchanged for stock in the new company. Under this Act, as interpreted by the Courts, the Water-works Company has a monopoly of the supply of water for sale, which is to last for fifty years from the date of the act of 1877.<sup>1</sup> Some improvements have been made of late in the service by the introduction of a stand-pipe, with a head of sixty feet, and by some extension of the mains. The problem of filtering the water, however, remains unsolved. It is, as a rule, very muddy and unattractive for any purpose. The use of cistern water, stored in cypress tanks, above ground, is almost universal in New Orleans. Such water, exposed to light and air and renewed by frequent showers, is clear and white, makes a charming bath and when filtered through

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<sup>1</sup> 115 U. S., 674; 120 Id., 64; 125 Id., 18.

porous stone as it may easily be, is agreeable and wholesome for drinking.

The gas supply of the city on the left bank, except in the Sixth and Seventh Districts, is furnished by a business corporation, which, after a considerable amount of contest in the Courts has by consolidation acquired an exclusive right for fifty years from 1875. The details of the legislation and of the discussions in regard to it will be found, like many other facts of the history of New Orleans, in the decisions of the Supreme Court of the United States.<sup>1</sup> The contest, however, with the new methods of electrical lighting has taken the place of litigation in the Courts. Already the arc light has driven gas entirely from the streets, and the incandescent lights are beginning to be numerous in shops and even in dwellings. One of the newest and largest churches is thus illuminated. With wire doors and windows, electric lights and electric fans, a library in New Orleans may be made as comfortable in August as in January. What may be the outcome of the struggle between cheap water-gas and electricity, it is not the province of this paper to predict. At the moment, electricity dominates in public places, and a system of iron towers for carrying the wires has already been begun.

## V.

The City of New Orleans has been at different times the recipient of donations for charitable purposes, which may be briefly referred to as part of her municipal history, and as throwing perhaps some light upon the question whether such gifts should be made to municipal corporations or placed in the hands of private trustees.

In 1838 by the will of Alexander Milne, a native of Scotland, property of apparently large value was left to four

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<sup>1</sup> N. O. Gas Co. *vs.* La. Light Co., 115 U. S., 650 and cases there cited.



asylums. The trust, so far as the Asylum for Destitute Boys is concerned, is now managed by the Mayor and the assets comprise a large amount of real estate of little present value, and some city bonds worth about \$3,000.

The will of Joseph Claude Mary, in 1840, left \$5,000 to the orphans of the First Municipality of New Orleans. After some litigation this bequest was declared by the Court<sup>1</sup> to vest in the Municipality, and should therefore be administered by the present City. At last accounts it had been turned over to a Boys' Asylum which is a private corporation. The reasons for this diversion of funds are not apparent, and, until some excuse be forthcoming, may be treated as inexcusable.

About the same time Stephen Henderson, a native of Scotland, bequeathed the sum of \$2,000 per annum for the poor of the Parish of Orleans, a territory now co-terminus with and controlled by the City of New Orleans. By an act of compromise with the heirs, the parish then, and the city now, has acquired sundry cotton-press lots, the rents of which are dispensed in small sums in charity to the poor. The bequest in this form can hardly be considered of much practical value. At least, from the hard-hearted view of modern political economy, such gratuities can produce little effect except to destroy the self-respect and will-power of the recipients.

The Girod Fund was left by the will of Nicholas Girod, who died in 1840. Its administration has not been felicitous. The principal, which in 1866, had reached a sum of about \$80,000, was expended in the erection of an asylum for the charitable purposes contemplated by the will. The building for some reason, never made public, was erected on the margin of a swamp in the rear of the city, in the most unwholesome locality that could have been selected, and is entirely useless.

The Touro Alms House bequest was made by the will of Judah Touro, a well known philanthropist, who died in 1854.

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<sup>1</sup> 2 Robinson, 438.

The sum of \$80,000 was left "to prevent mendicity in New Orleans." The trust was administered by the city. The Alms House was completed in 1860 at great expense on a site donated by Mr. R. D. Shepherd. In 1864 while occupied by United States troops it was destroyed by fire, and nothing tangible now remains of the charity except the land and a fund of about \$5,000. It is believed that the United States ought in equity to restore the value of the building.

The Fink Asylum Fund results from dispositions in the will of John B. Fink, of November, 1855, and has assets reported at about \$290,000. The bequest was for an asylum "for Protestant Widows and Orphans"; and the Court after some litigation decided<sup>1</sup> that it should be administered by the city. The income is used for the support of an asylum for the object named.

The Sickles Legacy was left, in 1864, by S. V. Sickles, an apothecary, for the purpose of establishing a "dispensary for indigent sick persons." It is administered by the Mayor and the financial officers of the city, by arrangement with druggists, who agree to dispense medicines to the poor at certain localities. Its fund now amounts to about \$36,000.

The McDonogh donation was the most important of those under consideration; was the one most peculiar in its character; and was a matter which concerned also the City of Baltimore. John McDonogh, a native of Baltimore, came to the City of New Orleans about the year 1800, lived the life of a somewhat eccentric bachelor, and died in 1850. The principal feature of his will was an attempt to establish an estate which was to be perpetual in its existence and was to grow into something prodigious in its proportions. As stated by the learned Mr. Hennen, in his summary of the litigation in the Supreme Court of Louisiana,<sup>2</sup> the decision in which was concurred in, substantially, by the Supreme Court of the

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<sup>1</sup> 12 Annual Rep., 301.

<sup>2</sup> Hennen's Dig., p. 443; 8 Annual Rep., p. 171.

United States,<sup>1</sup> McDonogh, after certain special legacies in apt terms, bequeathed all the rest of his estate to the cities of Baltimore and New Orleans, for certain purposes afterward mentioned, and especially the establishment and support of free schools for the poor only, of all colors in both cities. He directed his executors to invest his personal property in real estate to constitute a fund, never to be alienated, but to exist for all time, a perpetual entity, christened "My General Estate." Commissioners annually appointed by the cities, and subject to their visitation, were to have forever the seizin and exclusive management of this estate, the annual revenues of which were to be applied as follows: one-fourth to two designated institutions of pious character, to the former for a certain number of years, to the latter until a certain sum had been received, when both annuities were to cease; another fourth to the cities, to be handed over to their appointed directors to found certain charities, and when each city had received a certain sum these annuities in like manner were to cease; while the remaining two-fourths were to be divided between commissioners appointed by the cities, to whom, on termination of the other annuities, the whole revenues were to be paid to support the free schools in both cities.

No part of the estate or its revenues was ever to go into the hands of the corporate authorities, the testator declaring his great object to be "the gradual augmentation of the real estate to belong to and be owned by the General Estate for centuries to come." And this estate, and the several funds and institutions created, he recommended, should be incorporated. No partition was ever to be made by the cities, nor any change by agreement or compromise in their relations to each other or the estate; and if they violated any of the conditions, their rights were to be forfeited, and the estate, still inalienable, was limited over equally to the States of Louisiana and Maryland, to educate their poor as they might direct. If

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<sup>1</sup> 15 Howard, p. 367.

the legacies lapsed from any cause whatever, they were to enure to the States, to carry out the testator's intentions as far as they thought proper. The ultimate design was to educate the poor of the two cities, and disinherit the legal heirs. It was held by the Court, after great discussion, that the cities had the capacity to take the legacies, which were not void for uncertainty in the recipients of the charities; that there were no prohibited substitutions or *fidei commissa* in the bequests, of the conditions of which, so far as impossible or against public policy, the will was to be eviscerated; that the States could not take instead of the cities, which, as residuary legatees under a universal title, were entitled to the legacies; and that in any contingency the heirs at law could claim nothing.

The net result of the McDonogh will cases was to give the property to Baltimore and New Orleans, subject to sundry legacies and charges which were paid or compromised. The extraordinary plan which the imagination of the testator had formed in his lonely hours of celibacy was never realized; but the object was to some practical extent attained. The net proceeds of the estate were divided between the cities, to be applied to educational purposes. The popular belief has been that the trust has not been well administered by New Orleans. This belief, however, is not well founded. The amount of the estate was much exaggerated; portions of it were depreciated in the lapse of time, and the expenses of defending it were heavy. The city received in round numbers about \$750,000. With the proceeds she has erected and furnished eighteen school houses. At an early period of the late war some of the assets were diverted for the purpose of fortifying the city, but were afterwards restored. The present value of the property, including the school houses, is estimated at about \$800,000.

These various trust funds have gone through so many perils, and especially in times of civil war, that it is not believed such bequests will ever be again made in the future as in the past. From one point of view the city, by the continuity of its life



and the publicity of its methods, offers assurances of safety and care. The general verdict, however, would be that it is better for a testator to vest his benefactions in a private corporation, or, better yet, if possible, to establish them in full operation before his death.

## VI.

It may be proper to refer to the history of the elective franchise under the successive constitutions of Louisiana, in connection with the history of the city government of New Orleans. By the Constitution of 1812, the qualified elector is declared to be the "free white male citizen of the United States who at the time being hath attained the age of twenty-one years, and resided in the country in which he offers to vote one year next preceding the election, and who in the last six months prior to said election shall have paid a state tax; provided, that every free white male citizen of the United States who shall have purchased land from the United States shall have the right of voting whenever he shall have the other qualifications of age and residence above described."

By the Constitution of 1845 it was provided that "in all elections by the people every free white male, who has been two years a citizen of the United States, who had attained the age of twenty-one years, and resided in the State two consecutive years next preceding the election, and the last year thereof in the parish in which he offers to vote, shall have the right to vote."

By the Constitution of 1852 the qualified elector is declared to be the "free white male who has attained the age of twenty-one years and who has been a resident of the State twelve months next preceding the election, and the last six months thereof in the parish in which he offers to vote, and who shall be a citizen of the United States."

The Constitution of 1864 declared that every white male who had attained the age of twenty-one years, and who had

been a resident of the State twelve months next preceding the election and the last three months thereof in the parish in which he offers to vote, and who was a citizen of the United States should have the right of voting.

By the Constitution of 1868 the right of suffrage, except in certain cases of disfranchisement, was further extended to include every male person of the age of twenty-one years or upwards, born or naturalized in the United States, and subject to the jurisdiction thereof, and a resident of the State one year next preceding an election and the last ten days within the parish in which he should offer to vote.

Finally, by the Constitution of 1879, a further step was taken, and the right of suffrage, whether in State or municipal elections, now belongs to every male citizen of the United States, and every male person of foreign birth who has been naturalized or who may have legally declared his intention to become a citizen of the United States before he offers to vote, who is twenty-one years of age, and who has resided in the State one year, in the parish six months and in the ward or precinct thirty days, next preceding the election.

It will thus appear that the personal right of suffrage in New Orleans has been gradually extended until its latitude is extreme. Another provision, however, of the present Constitution alluded to above, establishes a safe-guard against the extravagance which might result from a misuse of the elective franchise as it affects the use of the taxing power. The City Council is prohibited from levying an annual *ad valorem* tax for general purposes exceeding one per centum on the assessed value of property, real and personal. Of course there are other taxes for the interest on city bonds, which must continue until the bonds are paid, but the tax for general purposes, or alimony of the city, is limited to the ten mills. At the same time, for the purpose of constructing "works of public improvement," the rate of taxation "may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the property tax-payers" of

the "Municipality entitled to vote under the election laws of the State and a majority of same voting at such election shall have voted therefor."<sup>1</sup> By this plan a certain control is vested in the property tax-payers, in a manner which promises to be beneficial.

Referring again to the successive constitutions of the State, attention may be directed to the protection they have sought to afford to the right of the citizens of New Orleans to deal directly as voters with the question of its police. The provision in the fundamental law of 1812 was as follows :

"The citizens of the town of New Orleans shall have the right of appointing the several public officers necessary for the administration and the police of said city, pursuant to the mode of election which shall be prescribed by the legislature ; provided that the Mayor and Recorder be ineligible to a seat in the general assembly."

By the constitutions of 1845 and 1852 the right was limited to the appointment, by the same methods, of the "officers necessary for the administration of the police of the city," and it was held by the Supreme Court that these provisions, whether in 1812, 1845, or 1852, did not impair the power of the legislature to deal with the drainage of the city, either directly or through the agency of a company.<sup>2</sup>

In the constitution of 1864 the provision was repeated as to the administration of the police, while the Governor, however, was empowered to appoint five commissioners, who, with the Mayor, should constitute a board to try and remove delinquent policemen.

The entire provision was omitted from the constitution of 1868, and under this the legislature introduced a metropolitan police system, imitated from that then existing in New York, and including a considerable territory outside the city limits ; and it was held to be lawful because the provision in question

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<sup>1</sup> Constitution of 1879, art. 209.

<sup>2</sup> *In re Draining Co.*, 11 La., Art. 338.

had been so omitted.<sup>1</sup> The commissioners were appointed by the Governor.

In the constitution of 1879 the right was restored by the following language :

“The citizens of the City of New Orleans, or of any political corporation which may be created within its limits, shall have the right of appointing the several public officers necessary for the administration of the police of said city, pursuant to the mode of election which shall be provided by the general assembly.”<sup>2</sup>

Under the present charter of the city—of 1882—the Mayor appoints police officers, policemen, and watchmen, by and with the consent of a majority of the Council, under the ordinances of the Council organizing the force, and may suspend such officers, reporting the fact and the cause to the Council for its action. He is empowered to control and make regulations for the force, the Council, however, having the right by a two-thirds vote to repeal such regulations.<sup>3</sup>

## VII.

The full history of a city government is not to be found in the statute books or the ordinances of its Common Council ; and this sketch would be incomplete without some notice of those voluntary associations on the part of citizens of New Orleans which during the last decade have attempted to assist or influence the city government in corporate matters.

The Auxiliary Sanitary Association was organized after the epidemic of 1878 for the purpose of promoting public health. It was felt that, in the condition of the finances of the City, it was necessary to invoke private subscription. The appeals of the Association met with a liberal response ; and the Association has continued to carry on its work, not only by a constant

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<sup>1</sup> *Diamond vs. Cain*, 21 La., Annual Rep., 309.

<sup>2</sup> Art. 253.

<sup>3</sup> Acts of 1882, p. 23.



criticism of imperfect methods, but by some positive works of public improvement. The most important of these is the system of appliances for flushing the gutters during the summer months with water from the Mississippi River. New Orleans is so situated that it is considered impracticable to construct the large subterranean sewers which are necessary to carry off storm waters. Such storm waters are therefore conveyed by gutters and draining canals to low points in the rear of the city and thence lifted by draining wheels into the lake. To flush these gutters and canals in hot weather, the Association has erected on the levee two steam pumps with a daily capacity of about 8,000,000 gallons each, and arranged a system of pipes by which the principal streets at right angles to the river are supplied with flushing water. It is said that such appliances if constructed by the city would have cost \$200,000. The Association, by its closer and more skilful business methods procured them for about \$75,000.

Without assuming any partisan attitude, mention may be made in this connection of two other associated efforts which have recently exercised much influence in the municipal history of New Orleans. One is called the Committee of One Hundred, the other the Young Men's Democratic Association.

The Committee of One Hundred was organized in the spring of 1885. It has taken no part in partisan politics, and none of its members can be a candidate for office. Its chief object is municipal reform. Its labors during its first year were chiefly performed in a scrutiny of official malfeasance or neglect, and in appeal to the Courts to enjoin and annul such acts of the Council as were considered illegal and injurious. Its first success in this direction was an injunction of an appropriation of \$5,000 for a purpose decided to be beyond the power of the Council to make. The amount was not great, but the example was impressive.<sup>1</sup> In the latter part of 1887 and the early days of 1888 its most important work has been in purifying the registration of voters. This registration,

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<sup>1</sup> The Liberty Bell, 23 Federal Reporter, 843.

intended to be a protection against illegal voting, was being used, as such devices often are, to facilitate fraud. The committee availed itself of serious disputes between the local political factions to intervene between them in this matter, and succeeded in making an examination of the books and a quite thorough house-to-house canvass of the city. The result was that not less than twelve thousand names were erased from the registration and the poll books. Many of these were fraudulent; many, however, were names of persons who were dead, or who had left the city, or moved their residences. In any event, such lists and papers might be used for purposes of fraud, and it was felt that this feat alone justified the existence of the committee.

The Young Men's Democratic Association was organized in October, 1887. It was said that the Holy Roman Empire was so called because it was neither Holy, nor Roman, nor an Empire. The association in question is not composed entirely of young men, nor of members of what is called the Democratic party. It takes no part in State politics. It has declined to participate in the primaries. Its object is declared to be "to promote the election of men of integrity and ability, irrespective of creed or calling, to fill the municipal offices of the City of New Orleans." It is provided by its constitution that "no member of this organization shall hold or be a candidate for any office, nor shall the organization enter into any combination or trade with any political faction." It freely assisted the Committee of One Hundred in the tedious work of purging the registration, and then waited to see what nominations would be made by the regular party organizations for the election of April 17, 1888. Dissatisfied with such nominations as were made, it put forth a ticket of its own, and then stood guard at the polls for nearly four days while the vote was being cast and counted. The unexpected happened, and the Young Men's ticket was elected amid much enthusiasm; and the hope is now freely indulged that the present executive officers and Council of the city will introduce many important reforms.



V-VI

# English Culture in Virginia



“Alas! how little from the grave we claim!  
Thou but preservest a face, and I a name.”

—POPE, *Epistle to Jervas*.

JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History—*Freeman*

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SEVENTH SERIES

V-VI

English Culture in Virginia

A STUDY OF THE GILMER LETTERS AND AN ACCOUNT OF THE  
ENGLISH PROFESSORS OBTAINED BY JEFFERSON  
FOR THE UNIVERSITY OF VIRGINIA

BY WILLIAM P. TRENT, M. A.

*Professor of History in the University of the South*

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BALTIMORE

N. MURRAY, PUBLICATION AGENT, JOHNS HOPKINS UNIVERSITY

May and June, 1889

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## INTRODUCTION.

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About a year ago the Editor of these Studies honored me by desiring my coöperation in the work he had undertaken with regard to the history of education in Virginia. I accordingly furnished two chapters for his monograph on "Thomas Jefferson and the University of Virginia," published by the United States Bureau of Education, Circular of Information, No. 1, 1888. But one seldom begins a line of investigation without being led to deeper research than he had at first intended; and so it was in the present case.

This new and independent study has been mainly developed from the correspondence of Francis Walker Gilmer. Who Mr. Gilmer was and what he did—things worth knowing but known to very few—will appear fully hereafter, for even the author of a "study" may occasionally borrow a device from the novelist and keep his readers in suspense; but it will be necessary to explain at the outset how the aforesaid correspondence came into my hands. The facts of the case are briefly these. Dr. Adams was informed by a gentlemen whom he had consulted about the work previously mentioned, that a volume of letters relating to the early history of the University of Virginia was in the hands of John Gilmer, Esquire, of Chatham, Virginia. A letter to that gentleman brought a courteous reply and the desired volume. Being much pressed by his professional and other duties, Dr. Adams handed me this voluminous correspondence with the request that I would examine it and express an opinion as to its value with regard to that period of the University's history on which he was specially engaged. I did examine it with great care, and found that, although it did not bear directly on the field of investigation Dr. Adams had chosen, it nevertheless

opened up a new field of hardly inferior interest. Upon this report Dr. Adams and Mr. Gilmer were kind enough to intrust the letters to me that I might complete a study, the outlines of which were already developing themselves in my own mind. In a letter to my mother I alluded to the fact that this task had been confided to me. She at once wrote me that she was certain another volume of a similar character was in existence, and that she would endeavor to obtain it for me.

Her statement proved true and the companion volume is now in my hands through the kindness of Mrs. Emma Breckinridge, of "Grove Hill," Botetourt County, Virginia. Mrs. Breckinridge is a sister of Mr. John Gilmer and a daughter of Peachy Gilmer, the eldest brother of the subject of this sketch. This second volume is even more invaluable than the first as it contains all of Gilmer's own letters to Mr. Jefferson, &c., and also throws many valuable side lights upon the internal history of Virginia for the period from 1815 to 1825. How and why these letters, nearly 700 in number, were bound and preserved will appear in the sequel. It will be sufficient here to ask indulgence for the mistakes which have doubtless crept into my work, and to return my hearty thanks to the friends who have assisted me in an investigation not wanting in complexity and minute details.

WILLIAM P. TRENT.

*The University of the South,  
December 1, 1888.*

# ENGLISH CULTURE IN VIRGINIA.

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## CHAPTER I.

### THE DEVELOPMENT OF THE UNIVERSITY IDEA.

At the beginning of this century what culture Virginia had was not Virginian. This is not a Virginia bull, but a deplorable fact. There was no lack of great men or of highly cultivated men. A Virginian occupied the Presidential chair, and three others had it in reversion. Patrick Henry was dead, but John Randolph, by his eloquence and wit and sarcasm, was making Congress doubt whether it loved him or hated him. At the Richmond bar were Marshall and Wickham and Wirt, while at Norfolk men were beginning to prophesy great things of an eloquent young lawyer,—Littleton Waller Tazewell. There were hundreds of well educated men riding over their plantations or congregating on court day either to hear or to make speeches—and even the bar of as small a place as Winchester could boast of speakers whom these educated men would willingly hear. Although there was a servile, ignorant mass beneath them, this could not then be helped, nor had the habits of inaction, thereby necessarily engendered, extended as fully as they afterwards did, to the affairs of mind. Travel was not uncommon. One old gentleman was “gigomaniac” enough to drive to Boston in his gig every other summer, the return visit of his New England friends being



made, it is supposed, during the summers his gig was mending. Although Mr. Jefferson and his colleagues had swept away every vestige they could of the feudal system, primogeniture in education was an every day fact—unjust as primogeniture generally is, but still a bright spot in the history of education in Virginia. Not a few families managed to send one representative at least to Europe for study and travel, and that representative was usually the eldest son. If England seemed too far, one or more of the sons went to Princeton or to William and Mary—many shutting their eyes to the fact that the latter historic place was even then slowly dying. Edinburgh, of course, was the goal of a young medical student's desires; but if he could not "compass this golden hope," Philadelphia was willing to receive him hospitably and to give him the benefit of her lectures and museums for a good round price. Books and libraries were not abundant; but the books were at least good, however exorbitant their cost—a serious item in the culture of a state fast ruining itself financially by an extravagant hospitality.

In some families it had been a custom to direct the factor in London to send back with the proceeds of the tobacco, a pipe of Madeira and a fixed amount of current literature—and hence it is that one occasionally comes across a rare first edition when rummaging the library of an old country house. Now if a boy had a taste for reading, he needed not to grow up an ignoramus even if he were not sent to college; but if he preferred his gun and horse, there were few to thwart him, his father having to look after the estate, tutors and schoolmasters being *rarae aves*, and the mother having enough on her hands in the housekeeping and the bringing up of her daughters, who, though they knew nothing of moral philosophy and aesthetics, had, nevertheless read Pope and the Spectator, and kept in their memories household receipts of considerable claim to genealogical pride.

But I said that the culture in Virginia was not Virginian, and I have not sufficiently explained my meaning. I do not

mean to imply the same reproach as is implied in the hackneyed invocation for "the great American novel." The culture in Virginia was naturally English modified by circumstances peculiar to a slaveholding, sparsely settled society. It was modified, too, by the birth of the feeling of independence and by the desire to try wings not fully fledged. All this was natural and is certainly not reprehensible. But there is another sense in which culture in Virginia was not Virginian, which if it does not imply reproach, must certainly cause a feeling of regret even to us of this late day. I refer to the almost universal lack of any primary and secondary instruction worthy of the name, and to the comparative lack of university instruction. William and Mary College had for many years done a great work in Virginia, but though buoyed up for a time by the wisdom of Mr. Jefferson as a visitor, and of Bishop Madison as president, its influence was fast waning and, before the first quarter of the century had gone by, was practically null. Hampden Sidney seems to have been little more than a high-school, and it has at all times been sectarian. Washington College (since Washington and Lee University) did not exert a large influence,<sup>1</sup> and hence it was that Princeton drew away sons from nearly every Virginia family of importance. When the foundation of a state university was being urged upon the legislature, a prominent Presbyterian clergyman of Richmond, Dr. Rice, made a calculation and found that over \$250,000 were annually sent out of Virginia to support youths at the various foreign schools and colleges. This does not look as if many Virginians patronized the three institutions above mentioned; but at any rate, it shows that a university of high grade was one of the needs of the people.<sup>2</sup>

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<sup>1</sup>In one of the early volumes of Dr. Rice's "Virginia Evangelical and Literary Magazine" (I think the sixth) a short account of the studies pursued at this college and a list of the instructors will be found. From this the truth of the above statement will be apparent.

<sup>2</sup>See Dr. Adams' "Jefferson and the Univ. of Va.," p. 98.

With regard to secondary and primary instruction the outlook was decidedly worse. Towns like Richmond had, of course, fair schools; but the country districts were almost entirely unprovided with even the rudest village schools. From a letter of John Taylor of Caroline, found among the Gilmer papers, I learned that there was a fairly prosperous boarding school in that county in 1817—but this was the exception, not the rule. It is true that just before the beginning of the century the legislature had passed a law with regard to the establishment of primary schools; but this law had been a dead letter because it was left to the county judges to decide whether such schools were necessary or not, and because the judges were, as might have been expected, either too conservative or too lazy to attend to such an innovation or such a small matter as a primary school. Education in Virginia, then, may be said to have been at a stand still, or rather on the decline, when Mr. Jefferson gave up his federal honors and betook himself to Monticello.<sup>1</sup>

The short annals of our country, however little they are attended to, are even in times of peace by no means destitute of "moving incidents;" and, though for the reader's sake I forbear the usual quotation from Milton, I cannot refrain from dwelling upon one of them. Although one may doubt whether Jefferson's mind was of the highest order, it can hardly be denied that he has impressed his personality and his doctrines more strongly upon posterity than has any other American. Although his brilliant rival's influence is still to be felt in our federal finances, and although Andrew Jackson is the representative of many distinctively American political ideas, it would still seem that a larger number of our countrymen look to Jefferson as the leader of their November choral song than to any other of our statesmen, living

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<sup>1</sup>The laudable efforts of the Scotch Irish settlers to provide education for their families ought not to be overlooked; but these men were poor and unable to accomplish great things.

or dead—and I know not of a better test of creative genius in politics. It was this man who left the sphere of national affairs to impress himself upon Virginia education; and I cannot but contradict myself and say that his victory should be “no less renowned.”

It is a glorious picture—to see a man who has tasted the sweetness of power, a man who could reasonably look forward to the ease and comfort of a dignified retirement, a man who, if he must work, might at least turn his talents to account in building up a fortune already shattered by an extravagant generosity, becoming the foremost in a movement, properly devolving on younger men, an arduous task well nigh impossible of success—the task of raising Virginia from the slough of ignorance and inaction. This he accomplished, and although it seems necessary for the authorities of the University of Virginia to state in their annual announcements that their institution was founded by Thomas Jefferson, there are a few men living who know the last work of the old patriot was as great and glorious as any of the successes of his vigorous manhood.<sup>1</sup> A short sketch of this work seems necessary as an introduction to the task I have undertaken of giving to the world some account of the labors

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<sup>1</sup> This cannot be said of his latest biographer, Mr. John T. Morse, Jr., who devotes only thirteen very general lines to what Mr. Jefferson deemed worthy to form one of the three services to his country for which posterity were to thank him when looking upon his tomb. Even a professedly political biography should have said more than this, for assuredly a statesman's attitude toward popular education must count for much when we come to estimate his statesmanship. Mr. James Parton devoted over eight pages to the subject and was thoughtful and painstaking enough to write to the chairman of the faculty (Col. C. S. Venable) for information about the University. In this connection it may not be amiss to quote Mr. Madison. “The University of Virginia, as a temple dedicated to science and liberty, was, after his retirement from the political sphere, the object nearest his heart and so continued to the close of his life. His devotion to it was intense and his exertions untiring. It bears the stamp of his genius and will be a noble monument of his fame.” *Madison's Writings*, Cong. Ed. 1865, III, 533.



of one who was not the least of Mr. Jefferson's coadjutors in this work of Virginia's redemption.

About the year 1814 certain monies found themselves in the hands of the trustees of an institution still in embryo—the Albemarle Academy. These trustees were the leading men of the county and among them Mr. Jefferson towered—physically as well as intellectually. How to spend the money most profitably was, of course, the paramount question. In a letter to his nephew, Peter Carr, one of the trustees, Jefferson sketched a plan of what Virginia education ought to be—a plan legitimately evolved from his bill of 1779 for the more general diffusion of knowledge. This letter was published in the *Richmond Enquirer* of September 7, 1814, and of course attracted great attention not only on account of the fame of its writer, but also on account of the wisdom and boldness of the scheme which it proposed. So comprehensive was this scheme that many a conservative head was shaken, some going so far as to say that the old philosopher was in his dotage. But no chemist has ever been more familiar with the properties of common substances, than was Mr. Jefferson with the characteristics of his fellow citizens. He knew the pulse of Virginia public opinion to a beat, and he felt that he would succeed through the very boldness of his plans. It was easy enough to persuade the trustees of Albemarle Academy to petition the legislature that a college might be substituted for a school—Central College also destined to remain in the embryo state. It was not difficult to obtain the consent of the legislature that Albemarle Academy should cease to be and Central College begin to be—for as yet that very sensitive nerve of the body politic, the financial nerve, had not been bunglingly touched. And so during the session of 1815–16 Central College in the County of Albemarle was duly established and given a board of trustees. Three members of this board have some claim to remembrance on the part of posterity—they were Thomas Jefferson, James Madison, and James Monroe. There

were others, too, who shall not go unnoticed. Possibly many thought that the establishment of this new college near his favorite town of Charlottesville, which he would fain have had the capital of the state, would satisfy Mr. Jefferson and enable him to die in peace. But the shrewd old gentleman was by no means satisfied; he bided his time, however, for now he saw light ahead, having a fellow workman whom his heart loved.

If Mr. Jefferson was the father of the University of Virginia Joseph Carrington Cabell certainly took infinite pains in teaching the child to walk. Born in 1778 of a distinguished and patriotic father, Colonel Nicholas Cabell, he was now (1817) in the prime of manhood. After graduating at William and Mary he had gone to Europe for his health, and, having recruited that, had studied in more than one of the leading universities. While in Switzerland, he had visited and conversed with Pestalozzi, and thus began that subtle connection of the University of Virginia with great men, which I hope to bring out strongly in the following pages. Meeting with President Jefferson on his return to this country, he began an intimacy which only ceased twenty years afterward at the death of the venerable statesman—an intimacy by which Mr. Jefferson was finally enabled to see his glorious idea realized in very fact.

Declining all offers of diplomatic position under the general government, Mr. Cabell plunged into the politics of his state, actuated by the idea so prevalent at the time that more distinction awaited the statesman in this circumscribed sphere than could possibly be obtained in the larger one of federal affairs. He was now an influential member of the state senate when Mr. Jefferson enlisted his aid in behalf of his pet schemes. That aid was willingly and efficiently vouchsafed, and has been commemorated by the publication of the Jefferson-Cabell Correspondence, a work containing valuable information but not so sifted and arranged as to be of much

use to the general reader.<sup>1</sup> The rest of this chapter will, however, be mainly derived from it.

On July 28, 1817, a called meeting of the trustees of the Central College was held at Mr. Madison's seat, Montpelier, in Orange County. There were present Thomas Jefferson, James Madison, Joseph C. Cabell, and John H. Cocke. The latter gentleman (1780-1866) was, from the beginning, a great friend to the university. He had attained some distinction in the war of 1812 as an efficient general, though inclining to the martinet. He was also known far and wide for his temperance proclivities. But we have more especially to notice the first steps taken toward importing culture into Virginia in the shape of efficient teachers. We find the following record spread upon the minutes of this meeting :

"It is agreed that application be made to Dr. Knox, of Baltimore, to accept the Professorship of Languages, Belles-Lettres, Rhetoric, History and Geography ; and that an independent salary of five hundred dollars, with a perquisite of twenty-five dollars for each pupil, together with chambers for his accommodation, be allowed him as a compensation for his services, he finding the necessary assistant ushers."

If the reader be curious to know what kind of a Doctor this gentleman was, I take pleasure in informing him that he was a clergyman, and that, although the *second* man called to a chair in Mr. Jefferson's college was an undoubted liberal, the *first* was highly orthodox. I leave this fact to those who, after sixty years, have not ceased from the hue and cry raised when Dr. Cooper was elected a professor in Central College.

But although two deists voted for the Rev. Dr. Knox as the first professor in their new college, I would not have it supposed that Mr. Jefferson was not disappointed. The following extract from a letter to Mr. Cabell, of January 5,

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<sup>1</sup> "Early History of the University of Virginia as contained in the letters of Thomas Jefferson and Joseph C. Cabell, &c." Richmond, J. W. Randolph, 1856.

1815, will give the reader some idea of what that disappointment must have been :

“I think I have it now in my power to obtain three of the ablest characters in the world to fill the higher professorships of what in the plan is called the second, or general grade of education ; [he refers here to his letter to Peter Carr, which the reader can find in the Jefferson-Cabell correspondence, page 384] three such characters as are not in a single university of Europe ; and for those of languages and mathematics, a part of the same grade, able professors doubtless could also be readily obtained. With these characters, I should not be afraid to say that the circle of the sciences composing that second, or general grade, would be more profoundly taught here than in any institution in the United States, and I might go farther.”<sup>1</sup> The three characters alluded to were Say, the great economist, who had recently written to Mr. Jefferson, proposing to come and settle near Monticello, a design which he never carried out ; Dr. Thomas Cooper, of whom more anon ; and possibly, nay probably, the Abbé Corrèa, a profound natural historian then lecturing in Philadelphia, and likely to be often introduced into these pages.<sup>2</sup> What wonder that Mr. Jefferson felt disappointed in having no one to vote for but Dr. Knox, of Baltimore !

The next meeting of the trustees was held at Charlottesville on the 7th of October, 1817, and we find the following entry, which is of importance to us :

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<sup>1</sup> Jefferson-Cabell Correspondence, p. 37.

<sup>2</sup> Dr. Adams suggests, p. 65, that Destutt Tracy was the third character, because of his attainments as an “ideologist.” This is by no means improbable ; but Corrèa was omniscient and the date of the above letter tallies so well with his visit to Monticello that I still hold to the above opinion. Besides the whole subject of moral philosophy would thus have been intrusted to a man not identified with our people—a thing which Jefferson was always opposed to. This objection would not have applied to Cooper, who could have taught Ideology, Law, and almost everything else—while Corrèa could have taught the rest ! Besides Say and Tracy would have clashed, both being economists.



“On information that the Rev. Mr. Knox, formerly thought of for a professor of languages, is withdrawn from business, the order of July the 28th is rescinded, and it is resolved to offer, in the first place, the professorship of Chemistry, &c., to Doct. Thomas Cooper of Pennsylvania, adding to it that of law, with a fixed salary of \$1,000, and tuition fees of \$20 from each of his students, to be paid by them, &c.”<sup>1</sup>

Here it seems proper to say a word or two with regard to this remarkable man. Doctor Thomas Cooper was born in London in 1759 and died in Columbia, S. C., in 1840. He practiced law in England, and was one of the representatives sent by the English democratic clubs to France during the Revolution. I find his different vocations summed up in an amusing way by a half mad philosopher and schoolmaster, James Ogilvie, of whom I shall have more to say hereafter. In a letter to Francis Walker Gilmer, Ogilvie says of Cooper: “He has undergone as many metamorphoses as Proteus. Ovid would certainly have immortalized him. In the course of the last twenty years he has been Farmer, Lawyer, Patriot, Judge, Belles-lettres cognoscenti and Professor of Chemistry, to which will shortly be added Doctor in Medicine and Professor of Law. As farmer he spent all his money, as lawyer he made some—as patriot the Federalists imprisoned him—as Judge the Democrats became enraged at him. *Then* the Federalists made him professor of Chemistry, at which he remains — . . . . He became weary of living single and married about twenty months ago, the consequence is he has a young daughter.” The best part of this amusing catalogue is that it is every word true. To this list of callings I can add that of calico printing in Manchester, at which he failed, and of statute-revising in South Carolina—at which he died. He came to this country in 1795 and settled with Priestley at Lancaster, Pennsylvania, in which state most of the exploits celebrated by Ogilvie were performed. After being compelled by

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<sup>1</sup> Jefferson and Cabell Correspondence, p. 397.

the clamor raised about his religious opinions to give up all idea of entering Mr. Jefferson's new institution, he went to South Carolina and became connected with the college at Columbia. He was a truly remarkable man, and published treatises on almost every known subject, beginning with Justinian's Institutes.

But returning from this digression, we find Mr. Jefferson more hopeful, now that it looks as if he were going to get at least one of his three "characters." Why not take advantage of the annual report that must be made by the trustees to the legislature and suggest that instead of Central College (good in itself, but still a mere college) the state herself found an University to be the top stone of a noble edifice to be known to posterity as the Virginia system of education? No sooner had this thought attained to fair proportions in his brain than the thing was done. To influence the other trustees was easy, and, with Cabell and his friends in the legislature, even that august body was brought to look upon the plan with favor, little foreseeing how soon the financial nerve was to be shocked. Accordingly on the sixth day of January in the year 1818, it was proposed that the property of Central College should become a nucleus for funds to be applied to the establishment of a true state university upon a respectable scale.

It would be useless to describe the wagging of conservative beards, more than useless to describe the tortures gone through by timid legislators speculating how their constituents would construe their votes. There was then in existence a Literary Fund, how formed matters not, which Mr. Jefferson's eyes had fastened upon. The financial nerve must be shocked, but delicately, and here was a way to do it. Accordingly an act appropriating part of the revenue of the Literary Fund, &c., passed on the 21st of February, 1818. So far, so good—but an all important question arises. Where shall the new University be? Now the lobbying and wireworking begin. There are several parts of the state which would not

object to becoming the seat of the Muses. Staunton, for instance, does not see at all why Charlottesville should carry off the prize. Wherefore a Commission is appointed to sit at Rockfish Gap, in the Blue Ridge, to determine a site for Virginia's University which all parties are now agreed must be something good of its kind.

This Commission sat on the first day of August, 1818, and was largely attended; the two ex-presidents heading the list of names.<sup>1</sup> Here Mr. Jefferson produced a map of the state and showed that Charlottesville was the centre of everything—certainly of his own desires. Who could refuse to gratify such a man as he stood there crowned with age and honors, and flushed with enthusiasm for an object both needful and glorious? Sectional jealousies were stifled, and Charlottesville was chosen as the site of the future University.<sup>2</sup> But the Commission did not dissolve before it had presented a report as to what ought to be taught in the new institution—a report in which Mr. Jefferson's hand is, of course, to be seen.<sup>3</sup> They recommended that ten professorships should be established as follows: (1) Ancient Languages, (2) Modern Languages, (3) Mathematics, pure, (4) Physico-Mathematics, (5) Physics or Natural Philosophy, (6) Botany and Zoölogy, (7) Anatomy and Medicine, (8) Government, Political Economy, &c., (9) Law Municipal, (10) Ideology, Ethics, &c. This was as comprehensive a scheme as even Mr. Jefferson could have wished, for did it not include his favorite Anglo-Saxon under the head of Modern Languages? But further the Commission advised that buildings be furnished wherein gymnastics might be taught, but did not advance to the modern

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<sup>1</sup>It is generally stated that President Monroe attended this meeting. This I am inclined to doubt, if the list of the signers of the Report be correct, and I afterwards discovered that Mr. Randall had noted the same error (*Life of Jefferson*, III, 463), if error it be.

<sup>2</sup>Jefferson-Cabell Correspondence, page 432.

<sup>3</sup>Jefferson had consulted John Adams as to a scheme of professorships two years before. *Adams' Works*, X, 213.

idea (or is it modern?) of having a special professor to teach them.<sup>1</sup> Thus the Rockfish Gap Commission set in glory.

The legislature receiving its report passed an act on the 25th of January, 1819, establishing the University of Virginia upon pretty much the same plan as that recommended by the Commission, leaving the visitors of Central College to fulfil their functions until relieved by the first Board of Visitors for the University of Virginia.

The first meeting of these latter took place on the 29th of March, 1819. There were present Thomas Jefferson, who was elected Rector, James Madison, Joseph C. Cabell, Chapman Johnson, James Breckinridge, Robert Taylor and John H. Cocke. After having elected a proctor and a bursar, and having chosen a common seal, they enacted sundry provisions as to the salaries of the professors which need not occupy us here; but one entry on the minutes is important enough to quote:

“That Dr. Thomas Cooper, of Philadelphia, heretofore appointed professor of chemistry and of law for the Central College, be confirmed and appointed for the University as professor of chemistry, mineralogy and natural philosophy, and as professor of law also until the advance of the institution and the increase of the number of students shall render necessary a separate appointment to the professorship of law. . . .”

Then follows a statement that it is both important and difficult to get American citizens as professors, and Thomas Jefferson and John H. Cocke are appointed a Committee of Superintendence to secure such provisionally—all actual engagements being deferred until the Board shall meet.

The report of Cooper's election being now noised abroad through the state, the sectional feeling before alluded to not

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<sup>1</sup>For a subsequent scheme of establishing a chair of agriculture, the duties of which were finally assigned to the professor of chemistry, see Madison's Writings, III, 284-7.



having been allayed, and the politicians fearing that Jefferson had entrapped them into a new way to spend money for which they would be held responsible, a terrific outcry arose that Atheism was to be publicly taught, that the state would become bankrupt, that the good old times were gone forever, and that war was being waged against the manhood and virtue of Virginia by the arch-scoffer of Monticello, seconded by his deistical follower of Montpelier. The hue and cry was as loud as it was silly. As is often the case, "base political tricksters" joined with really honest and well-minded clergymen in this war of words and pamphlets. The result will be seen in the record of the meeting of the Visitors on October 4, 1819, where the duties of Dr. Cooper's professorship are deferred and the Committee of Superintendence directed to arrange with him the terms on which such postponement may be made *conformable to honor* and without inconveniencing him. The non-completion of the buildings and Cooper's own offer to resign furnished a plausible plea for this treatment; and we see from the Rector's report for November 29th, 1821, that Cooper, who in the meantime had been made president of the Columbia, S. C., College, compromised for \$1,500. So ended the Cooper episode, not very pleasantly for any of the parties concerned.<sup>1</sup> I have paid attention to it because it is of considerable importance to my main theme, which might be called not inaptly "The evolution of the University of Virginia's professorships."<sup>2</sup>

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<sup>1</sup> But even as late as January, 1824, Jefferson had not wholly given up the idea of getting Cooper, nor had that gentleman himself lost hope. See Madison's Writings, III, 360.

<sup>2</sup> It may be remarked here once for all that no questions were asked as to the religious opinions of any of those who first filled chairs in the University. The agent who was sent to England did not mention the subject until it was broached to him. All of the first faculty seem to have been Episcopalians except Dr. Blaetterman, who was a Lutheran. See Randall, III, 467-8. It is curious that John Adams opposed the selection of foreign professors because they would teach Christianity. See his works, X, 415.

I have not the space, even if I had the inclination, to describe the woes and tribulations which the friends of the university underwent for the next four years. Every fresh demand for money was received with a groan by the legislature. Men forgot that not one private house in a hundred is built for anything like the first estimate, and they accused Mr. Jefferson of everything a scurrilous politician knows himself to be guilty of. But the philosopher stood it all, though sorely tried at times. He was out of the thick of the fight, as a general should be, but his lieutenant, Cabell, was doing manful work in Richmond, a city opposed to Mr. Jefferson on principle, and hence inveterately hostile to the new university. Even those who were not hostile despaired of its success, and the majority Cabell could count on in the legislature showed signs of becoming a minority. Finally one great move was made by the foe—this was no less than to remove William and Mary to Richmond and give the old college another chance in connection with a medical school which would have clinical advantages Charlottesville could not give. This was a side blow to the University, and an almost deadly one. "What!" its advocates would say, "Here you have had oceans of money given you by the state, and you begrudge setting this historic college on its feet again!" And so the columns of the *Enquirer* for 1824 were filled with contributions signed by "Friends of the State," "Friends of learning," "Constant Readers," and other representatives of a class that unfortunately still survives. But Cabell and his stout phalanx, among whom was Dr. Rice, reconciled now that Cooper was put out of the way, won the day in spite of the opposing odds. The president of William and Mary had to wend his sad way homeward, and the college which had partially revived under his management drooped finally forever.<sup>1</sup>

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<sup>1</sup>This was written before the scheme for the rehabilitation of the noble old college appeared to have any chance of success. Under its present

But in the meantime something was doing which concerns us more nearly, something as important as anything which Jefferson had planned or Cabell executed.

Reference has been made to the fact that the Board had seen the wisdom of conciliating public opinion by securing native professors. But they were determined to have none but good ones. All their outlay would have been to little purpose if the professors chosen were but ordinary men; and so the selection of professors was by far the most difficult task that lay before them. They were prompt in their action. On the 3d of October, 1820, they resolved that negotiations should be entered into with "the following persons with the view of engaging them as professors of the University, viz., Mr. Bowditch, of Salem,<sup>1</sup> and Mr. Ticknor, of Boston."<sup>2</sup> The compensation to be given them was ample, considering the data of the offer; it consisted of apartments, of a regular salary of \$2,000 per annum, of a fee of \$10 from each student in their classes, and an engagement on the part of the University to see that the sum total of \$2,500 should be secured to them for the first three years.<sup>3</sup> For reasons best known to themselves these gentlemen declined and, as Mr. Jefferson

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efficient management there seems to be no reason why William and Mary should not live forever to connect modern generations with those old times of which we are so proud. Certainly the friends of the University of Virginia can afford not to be jealous and to lend all their help to the meritorious enterprise, and certainly the thanks of all Virginians are due to the Bureau of Education for the monograph which turned the light of modern educational science upon the time-honored institution.

<sup>1</sup> Nathaniel Bowditch (1773-1838), the well-known mathematician and navigator, and translator of Laplace's "*Mécanique Céleste*," refused professorships in Harvard and West Point as well.

<sup>2</sup> Ticknor's visit to Monticello in 1815 had made a deep impression on Mr. Jefferson, and is more than once mentioned in the Gilmer letters. See Ticknor's *Life and Letters*, I, 34, 300, 302. Both these nominations seem to have excited the displeasure of the religious opponents of Cooper. See Adams' *Thomas Jefferson* on p. 71.

<sup>3</sup> Jefferson-Cabell Correspondence, page 460.

had probably foreseen from the start, the University was forced to look abroad for a majority of its first professors. This naturally brought up two questions, how many professors were to be gotten, and who was to choose them. The Board some time before had determined that only eight professors could be employed at first, for the fund at their disposal had not proved too ample for the buildings, and economy was necessary on all sides. Mr. Jefferson and Mr. Madison, with him, thought that two of these professorships could not well be intrusted to foreign hands—those of ethics and law—but that the other six had better be filled from England. This was proposed to the members of the Board by letter and elicited the following response from Mr. Cabell.

BREMO,<sup>1</sup> *April 16, 1824.*

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I was very much pleased at the limitation of the foreign professors to a moiety of the whole number. I thought I could see advantages in this limitation, which I attempted to explain to the Board of Visitors. I need not repeat what I said upon this subject. The Professor of Anatomy is not like the Professor of Law and Politics, and the Professor of Ethics, connected with a science calculated to give tone and direction to the public mind, on the most important subjects that can occupy the human understanding. It is of the class of Professorships which may be prudently filled by foreigners. For this reason, and because the difference between five and six is but one; and above all, because you are an infinitely better judge of the subject than I am, and it is my greatest happiness to give you pleasure upon any and upon all occasions, you may consider me as yielding my assent to your

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<sup>1</sup> Brema was Gen. Cocke's county seat in Fluvanna. For this letter see the Jefferson-Cabell Correspondence, page 303.



proposition to instruct the agent to engage the Anatomical Professor in Europe. . . . Yours,

JOSEPH C. CABELL.

I concur with Mr. Cabell in the above.

JOHN H. COCKE.

The first question having been satisfactorily answered, the second pressed for solution. Mr. Jefferson's first choice of a commissioner who should proceed to England to procure the necessary professors, naturally fell upon the man who had stood by him so nobly and so faithfully—Joseph C. Cabell. But Mr. Cabell's affairs were embarrassed, for he had purchased a large portion of his brother's property which would be a dead loss unless it received his immediate personal attention; besides he needed rest, and moreover had another scheme on his hands—a canal to connect the eastern and western waters. So he was forced to decline this commission, honorable and confidential as it was. Then Mr. Jefferson rode over to Mr. Madison's and they consulted long and earnestly about the matter. This was in November, 1823. Finally Mr. Cabell was consulted and doubtless others of the Board, and then Mr. Jefferson wrote to a young lawyer in Richmond requesting his presence at Monticello on urgent business. The antecedents of that young lawyer must now engage our attention.<sup>1</sup>

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<sup>1</sup> Much of the preceding chapter is necessarily a recapitulation of what Dr. Adams has so well and so fully presented in his recent monograph. I must add, however, in justice to myself, that the chapter was written several months before I was enabled to consult Dr. Adams' work. I have, therefore, travelled over the same ground independently, and can testify, were testimony needed, to the thoroughness and accuracy of his researches and conclusions.

## CHAPTER II.

### FRANCIS WALKER GILMER.

Francis Walker Gilmer was the youngest child of Dr. George Gilmer, of Pen Park, Albemarle County, Virginia. He was born on the ninth day of October in the year seventeen hundred and ninety, or rather Francis *Thornton* Gilmer was born on that day, for so the young child was christened. He did not assume the name Francis Walker until after the death of an uncle of that name—an event which happened somewhere about the year 1808.<sup>1</sup> The Gilmers are of Scotch extraction, and settled in this country in 1731.<sup>2</sup> They have always held a high and honorable position, and many members of the family have been distinguished for more than usual intellect. They have given Virginia a Governor and the United States a Cabinet Minister in the person of Thomas Walker Gilmer, Governor of Virginia (1840–41) and member of Congress, who was killed just after his appointment as Secretary of the Navy, by the bursting of a gun on board the “Princeton” in February, 1844. The victim of this tragedy, which deprived Virginia of two of her most eminent men, was the nephew of the subject of my sketch.

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<sup>1</sup> This may have been the Francis Walker who was a representative in Congress 1793–1795; but the point is uncertain.

<sup>2</sup> For a good account of the Gilmers see “Sketches of some of the First Settlers of Upper Georgia,” by Gov. George R. Gilmer (New York, Appleton, 1855). The Gilmers settled in Georgia after the Revolution, and the author of the above-mentioned book was one of the most noted members of the family.

I do not think that the genealogy of the family with a long string of names and dates is essential to my purpose, but a few words descriptive of Mr. Gilmer's father will not be out of place—for the son was said to have inherited, in no small degree, his father's temperament and talents. Now, for such a description, I can go to no better person than William Wirt, Dr. Gilmer's son-in-law. In a letter to Francis, written from Richmond on the 9th of October, 1806, Mr. Wirt speaks as follows:—"You, I understand, propose to follow your father's profession. The science of medicine is, I believe, said to be progressive and to be daily receiving new improvements—you will, therefore, have a wider field to cultivate, and will take the profession on a grander scale—it will be your own fault, therefore, if you do not, as a physician, 'fill a larger space in the public eye.' But the space which your father occupied was not filled merely by his eminence as a physician (although he was certainly among the most eminent), he was moreover a very good linguist—a master of botany and the chemistry of his day—had a store of very correct general science—was a man of superior taste in the fine arts—and to crown the whole, had an elevated and a noble spirit, and was in his manners and conversation a most accomplished gentleman—easy and graceful in his movements, eloquent in speech, a temper gay and animated, and inspiring every company with its own tone—wit pure, sparkling and perennial—and when the occasion called for it, sentiments of the highest dignity and utmost force. Such was your father before disease had sapped his mind and constitution—and such the model which, as your brother, I would wish you to adopt. It will be a model much more easy for you to form yourself on than any other, because it will be natural to you—for I well remember to have remarked, when you were scarcely four years old, how strongly nature had given you the cast of your father's character."<sup>1</sup>

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<sup>1</sup> This letter is one of the many from Wirt to Gilmer, given in Kennedy's *Life of Wirt*. I had intended to append a special dissertation, showing

Mr. Wirt spoke warmly, and he had reason so to do. He had come poor and friendless into a strange state, and the Gilmers had taken him by the hand. His humble birth was forgotten and, in 1795, he married Mildred, the eldest daughter of the house. Pen Park, the Doctor's country seat, was near Monticello, and the master of the house, having himself served the Revolution well, was the intimate friend of Thomas Jefferson.<sup>1</sup> Living at this hospitable home with his young bride, Wirt was thrown with Jefferson and Madison and Monroe, with the Barbours and the Carrs. The youngest Carr, Dabney, son of Dabney, was ever after his dearest friend. Of him we shall have to speak many times.

But troubles came upon the house. Dr. Gilmer died shortly after the marriage of his daughter, and the latter did not long survive him. Wirt, cast adrift upon the world after many wanderings, settled down in Richmond to achieve a well-earned fame. Pen Park passed out of the family, and the brothers were scattered. Peachy, the eldest of the surviving

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how Kennedy wilfully altered these letters; but I find that I can only allude to the fact briefly. Allowing for mistakes that might have been made in copying, I find abundant proof that Kennedy took it upon himself to improve the style of Wirt's letters, although he did not tamper much with the matter. He did not succeed in this gratuitous task. The original letters are far less tame than the epistles which have been substituted for them. Frequently whole sentences are omitted, with no asterisks to mark that the text is not continuous. Two of the letters are misdated, phrases are often transposed or dropped, and in one letter, of which only half the original is given, I count upwards of twenty-three variations. It is needless to say that Wirt was not the man to use strong terms unless he meant them. Mr. Kennedy has not thought fit to leave any of the few expressions which show that Wirt was after all a man like ourselves. He does, however, leave the letter in which Wirt made the curious mistake of attributing to Beattie or Dryden the majestic passage from Gray's "Progress of Poesy," beginning "Now the rich stream of music winds along." This mistake is rendered all the more curious by the fact that Wirt was fond of repeating "The Bard."

<sup>1</sup> Dr. Gilmer left certain manuscripts relating to the Revolution. These have been edited by R. A. Brock, and published in one of the late volumes of the Virginia Historical Society Papers.



children, settled far away in Henry County to the great disgust of his friends who thought that his many talents deserved a wider field. James, another promising son, died just as he was about to build up a law practice at Charlottesville. Harmer and Francis, the two younger, were left to get what education they could in a county where good schools flourished not. The guardian of Francis (and I presume Harmer's also) acted an ignoble part by them and, if I chose to present the pitiful letters of the former, written in his sixteenth year, I could give this chapter a very mournful cast. The boy's training was almost entirely neglected, and though he had property of his own, he got little good from it during his minority. But he had a few warm friends. The family at Monticello offered all the help a proud nature was willing to accept. Mrs. Randolph taught him French and he grew up and played with her children, and even then Mr. Jefferson noted the brilliancy of his mind and prophesied great things of him.

His letters of this period (1806) are interesting, for they give us glimpses of a fine character gradually moulding itself under circumstances as adverse as possible. Now he describes his forlorn position; now he gives us his opinion of the books he has been reading; now he tells how kind the Monticello people are. He does not like Pope's Homer for the time-honored reason that Pope is not Homer; but he nearly cried over the episode of Nisus and Euryalus. Anacreon is not much to his fancy, but he delights in Cæsar's Commentaries and thinks they are "very easy."

But in 1807 a brighter tone appears. A Mr. Ogilvie is going to have a fine classical school at Milton (a small hamlet near Charlottesville), and he will at last have a chance to make a man of himself. Alas! this hope fails him, for the aspiring Ogilvie cannot content himself with two scholars.

I fear my readers will accuse me of being a man of many digressions, but I cannot refrain from a passing notice of this eccentric character who became a correspondent of Gil-

mer's. He was a Scotchman of good family and was born about 1775.<sup>1</sup> Emigrating to this country he taught a school in Richmond where he was very successful in stimulating his pupils with a love for study, although his own mind was too unbalanced to have imparted much solid information. Some of his pupils were afterwards distinguished—a writer in the *Southern Literary Messenger* (Vol. XIV, p. 534), enumerating Gen. Winfield Scott, Hon. W. S. Archer, Gov. Duvall, of Florida Territory, and possibly Thomas Ritchie, the editor of the Richmond *Enquirer*. Whether this Richmond success came before or after the Milton failure, I am unable to say, as the dates are rather mixed. But Ogilvie was not destined to be a "drudge of a schoolmaster;" he conceived the laudable and lofty design of enlightening the American people upon the principles of "true oratory" and of "*philosophical criticism*." But such a task required arduous preparation, and he accordingly retired from South Carolina where he had been on some wild goose chase, to the backwoods of Kentucky, there to meditate and woo the Muse of Eloquence. Whether it was for this latter end that he joined a volunteer expedition against the Indians, I know not; but the account he gives of that expedition, in a letter to Gilmer, is worthy of preservation. It must, however, be condemned to lie among its companion MSS. until I can find a fitter opportunity to give it to the world. Having encountered no Indians, the philanthropist retired to a lonely log house, stipulating with his landlady that he was to see no company—a rather unnecessary precaution it would seem. Here in the winter of 1812-13 was composed a series of orations which were shortly afterwards delivered in Philadelphia, New York and Boston. In spite of his erratic religious opinions his success was remarkable. The American people were evidently willing to be

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<sup>1</sup> The biographical dictionaries give the date of his birth variously. I ascertained from one of his letters that the date I have given is the right one.

instructed in the principles of oratory and of philosophical criticism, whether the instruction profited much or little. The letter in which he describes his success is worthy of this peripatetic from the Athens of Scotland to the Athens of America. Among his auditors in New York was Francis Jeffrey. In Boston young George Ticknor thought him a wonderful elocutionist.<sup>1</sup> But the use of narcotics was gradually destroying his mind. A volume of his essays was received with derision; and having heard of the death of his relative, the Earl of Finlater and Airy, without near heirs, he determined to go to Scotland and put in his own claim for the title. He failed and died at Aberdeen in 1820, presumably by his own hand. He is said to have done much harm to the cause of religion and morality in Virginia; of this I have no evidence. His pupils spoke of him with affection, and his influence on young Gilmer was probably confined to stimulating him in the study of the classics and to giving him a bent toward public life; for, as we have seen above, the latter had at one time proposed to become a physician.

But although Francis was thus disappointed in his expectation of becoming a pupil of this curious man, something better was in store for him. Through the efforts and advice of Mr. William A. Burwell, long a member of Congress from the Bedford district, and a firm friend of the Gilmers, the boy, now in his eighteenth year and the possessor of a vast amount of ill-sorted information, was placed at a school in Georgetown where he would be under Mr. Burwell's eye. This was in the winter of 1808-9. In the fall of 1809 he entered William and Mary College and remained there for a session. Mr. Wirt says that he met him there for the first time since his childhood, and that "in point of learning he was already a prodigy." He adds:<sup>2</sup> "His learning, indeed, was of a curious cast: for

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<sup>1</sup> Ticknor's Life, &c., I, 8.

<sup>2</sup> This is taken from Wirt's preface to the Baltimore edition of Gilmer's Sketches, to be mentioned hereafter.

having had no one to direct his studies, he seems to have devoured indiscriminately everything that came in his way. He had been removed from school to school, in different parts of the country—had met at all these places with different collections of old books, of which he was always fond, and seemed also to have had command of his father's medical library, which he had read in the original Latin. It was curious to hear a boy of seventeen years of age [he was over nineteen] speaking with fluency and even with manly eloquence, and quoting such names as Boerhaave, Van Helmont, Van Swieten, together with Descartes, Gassendi, Newton, Locke, and descanting on the system of Linnaeus with the familiarity of a veteran professor. He lived, however, to reduce this *chaos* to order, and was, before he died, as remarkable for the digested method as the extent and accuracy of his attainments."

Such was the impression made by this remarkable youth that Bishop Madison, then president of the college, offered him the ushership of the grammar school connected with the institution, but the offer was declined; for the young man was bent upon public life. Among Gilmer's classmates was George Croghan, of Kentucky (1791-1849), destined to become a hero in the war of 1812; they seem to have had some correspondence after the termination of hostilities, but only one letter of Croghan's has been preserved.

In 1811 we find that Mr. Wirt had invited Gilmer to read law with him in Richmond; and now follow some of the pleasantest years of his life. Wirt was at that time at the head of the Richmond bar, and his "Letters of a British Spy" had given him a national renown. He had married into a distinguished family (the Gambles), and was able to introduce his protégé to a large and cultivated circle of friends—to Wickham and Hay and Call<sup>1</sup> and Dr. McClurg,<sup>2</sup> to Tazewell

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<sup>1</sup> All leading lawyers, the latter was reporter for the Court of Appeals.

<sup>2</sup> A finely educated physician, and a member of the Philadelphia Convention of 1787.



whenever he came to practice in the Court of Appeals, to ex-Gov. now Judge Wm. H. Cabell, who entertained most of the strangers of distinction that visited Richmond, to Dr. Rice, of whom we have heard before; to Dr. Brokenborough, the life-long friend of John Randolph, and last but not least, to William Pope, the prince of good fellows, who lived about twenty miles from Richmond, but whose jokes were known from one end of the state to the other. Pope was the man who, whenever he came to Richmond, went to Wirt's office to hear select passages read from the "Life of Patrick Henry," and did nothing but weep during the performance.

Here, then, was some compensation for the dreariness of his early life. We catch glimpses of his progress through Blackstone, on to Mansfield and Erskine, and finally, O dreary task! to the Virginia Reporters. We hear his opinions of different reigning belles and of the last doings of Napoleon; we find him rejoicing at his providential escape from the burning of the Richmond Theatre; and finally we come full upon vivid descriptions of the horror felt in Richmond at the reports of Cockburn's raid.

In the militia movements of the state during this troublesome time Gilmer took his share. In the camp below Richmond, near Warrenigh Church, he drilled daily with his friends the Carrs and young Jefferson Randolph. His fellow student in the law, Abel P. Upshur, was also there, not destined to be shot by the British, but to rise to be Secretary of the Navy and of State, and to perish in the accident on board the Princeton. But the British would not come in spite of the fact that brave and irascible Colonel Thomas Mann Randolph (Jefferson's son-in-law) was waiting for them; and the passage from Tyrtæus, which he had copied out in the Greek and given to Gilmer, did no good at all. What wonder then that the warlike Colonel, afterwards Governor, knocked a gentleman down for alluding to this abortive campaign!

Flesh and blood could not stand a camp before which no enemy was to be seen, and so we find Gilmer and Upshur

tossing away their guns and sallying homeward, leaving Captain Wirt, with his flying company of artillery, to write soothing letters to Mrs. W. and to curse his own position.

In the meantime young Harmer Gilmer, who had taken his medical degree at Philadelphia, and was looking forward to following in his father's footsteps, was taken ill at Charlottesville and died. Francis was with him and nursed him faithfully, although his own health was far from good. He had always been slight and frail, and the air of Richmond did not agree with him. And now that his companion brother had been taken away from him, the clouds that lowered over the whole country seemed to be blackest over his own devoted head.

But with him, as with all of us, time and change of scene wrought a cure. We pass over his snubbing Wirt's attempts at Comedy (Kennedy, I, 351), and the gay days spent at Montevideo, Judge Cabell's residence in Buckingham, and find him at last fully determined to begin the practice of the law in Winchester. He had previously thought of settling in Lexington, Kentucky; but, as with subsequent schemes, the thought of leaving his mother state, now that she seemed in a precarious condition, unnerved him and he resolved to stay. Not the least interesting part of these letters is the constant reference to the financial affairs of Virginia from 1815 to 1830. They show an utter despair of improvement, from the complete relapse, suffered after the war of 1812, and from the load of debt then sorely pressing upon the older families. The troubles that came upon Mr. Jefferson have become historic, but I could mention other cases to show that the current opinion that Virginia was ruined by the late war is utterly erroneous. Virginia was ruined long before, ruined by an extravagant system of labor, by a lavish hospitality, by inattention to ordinary business principles. The war only hastened the crisis a few years.

Gilmer's plan of settlement was made in April, 1814; but in September of that year his schemes had not been matured,

owing to the unsettled state of the country. In the meantime he had been exercising his pen in the production of certain essays—having now locked up among his treasures a manuscript volume of “Physical and Moral Essays,” some of which afterwards saw the light. As a few of his literary productions are of consequence in themselves, and as all are of consequence in enabling us to inform ourselves of his character, I shall in this chapter simply note the date and title of such as were published, and shall defer all discussion of their merits until a subsequent chapter in which I hope to examine the character of the man and his work in some detail.

It was during this summer that he became acquainted, or at least developed an intimacy with that wonderful old philosopher, the Abbé Corrèa. With the exception of Mr. Jefferson this man did more to form Gilmer’s character than did any other of his distinguished friends. Joseph Francisco Corrèa de Serra was born in Portugal in 1750. He studied at Rome and Naples, was admitted to holy orders, and returned to Portugal in 1777. Here he took great interest in the foundation of the Lisbon Academy, and in 1779 was made its perpetual secretary. He did an excellent work while connected with this institution in collecting cabinets of specimens—chiefly botanical, and in editing numerous unpublished documents relative to early Portuguese history. But he did not escape the suspicions of the Inquisition, and in 1786 it became necessary for him to seek refuge in Paris. There he continued his studies and contracted an intimacy with the naturalist Broussonnet. After the death of Pedro III, Corrèa returned to his native country, and to him Broussonnet fled on the outbreak of the Reign of Terror. Rendered an object of suspicion by his hospitality to the exile, Corrèa found it necessary to go into hiding himself; for the authorities, under the direction of a tyrannical intendant-general of police, were busily engaged in crushing out all democratic tendencies. After a retreat to London, about 1796, Corrèa was employed in a diplomatic relation at Paris, where he

remained from 1802 to 1813. In the latter year he embarked for the United States and, coming to Philadelphia, was engaged to deliver lectures on botany in the University of that city. He was subsequently appointed Portuguese minister to this country. Like all foreigners he was attracted to Mr. Jefferson and became a frequent inmate at Monticello where, in all probability, Francis Gilmer first met him. The Abbé was drawn toward the young Virginian by the latter's enthusiasm for all science—especially for botany. We have heard how Mr. Wirt found him discoursing on Linnaeus at Williamsburg, and it appears from his letters that he had since gone deeper into the subject. He was familiar with the flora of most of the sections of his native state, and he was now destined under the guidance of Mr. Corrèa to make vast acquisitions to his knowledge. But I shall let him describe his new friend in his own words, which are taken from a letter written by him to his brother Peachy Gilmer on the 3d of November, 1814:

“I am so far [Richmond] on my way to Philadelphia with Mr. Corrèa, of whom, I dare say, you heard me speak of last summer. He is the most extraordinary man now living, or who, perhaps, ever lived. None of the ancient or modern languages; none of the sciences, physical or moral; none of the appearances of earth, air, or ocean, stand him any more chance than the Pope of Rome, as old Jonett<sup>1</sup> used to say. I have never heard him asked a question which he could not answer; never seen him in company with a man who did not appear to be a fool to him; never heard him make a remark which ought not to be remembered. He has read, seen, understands and remembers everything contained in books, or to be learned by travel, observation, and the conversation of learned men. He is a member of every philosophical society in the world, and knows every distinguished man living, &c.” Making all due allowances, we must, nevertheless, admit that the

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<sup>1</sup> I do not know who is referred to.



man who could so impress a young man rather given to cynicism than otherwise, was no ordinary personage.

The journey to Philadelphia was taken, and Gilmer pronounced the months spent there the happiest of his life. He contracted intimacies with John Vaughan, Secretary of the Philosophical Society, with Dr. Caspar Wistar, afterwards president of that society, and connected with the abolition movement, with Robert Walsh, the *littérateur*, and with young George Ticknor, then opening his eyes at the magnificence of Philadelphia dinner parties. He was probably present at the very dinner where John Randolph, in defending the gentlemen of Virginia from an imaginary insult from Mr. Corrèa, forgot, as he so often did, to be a gentleman himself.<sup>1</sup> But he had to tear himself away at last, even from the fascinations of a certain belle who is not infrequently mentioned in the letters written about this time. The visit not only left pleasant memories but led to various correspondences which will be mentioned in due course, but which cannot be enlarged upon. It also led to a great scheme, mysterious and all engrossing, the particulars of which I have not been able to make out, but which shows that the young man of twenty-four was still enthusiastic. It is a scheme of travel in Europe with Mr. Corrèa, from which large revenues are in some way to flow—but the aforesaid revenues would not begin flowing out until a thousand dollars were poured in, which thousand dollars Peachy Gilmer was conjured to bring with him to Albemarle. But luckily or unluckily for our schemers, Napoleon came back from Elba and set Europe in a blaze, which the philosophic Corrèa, now aged 65, did not care to pass through, and so this mysterious quest of El Dorado in the old world was abandoned, and Mr. Gilmer settled down in Winchester about the first of August, 1815. But he had not begun to practice before the old Abbé was on him again, this time come to per-

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<sup>1</sup> Ticknor's *Life and Letters*, I, 16.

suade him to take an expedition through the Carolinas for botanizing purposes. The temptation was too strong; the young lawyer was so highly flattered by the evident fondness of the great man for him, and his scientific ardor was so kindled, that the shingle freshly hung out was taken down and the two enthusiasts started off. I leave the reader to imagine the pleasure Gilmer found in seeing new places and new faces, and in learning a favorite science under such a teacher; I must myself hurry on in my narrative.

Winchester now became Gilmer's abode for the next two years. There he found a respectable bar, and what was better, three staunch friends—Dabney Carr, Henry St. George Tucker, and Judge Holmes. Dabney Carr was, as we have already seen, the great friend of William Wirt, and the favorite nephew of Thomas Jefferson. He was now in his forty-fourth year, and was Chancellor for the Winchester district. He was an amiable and intelligent man, and did much to direct the young practitioner in his studies. Tucker was then member of Congress for his district, and his letters written to Gilmer from Washington are not the least interesting in this correspondence. These two, together with Judge Holmes and Mr. Wirt, helped to make Gilmer the most learned lawyer for his age in Virginia.

It is interesting to read of his successful defence of a horse-thief who was notoriously guilty; of the six cases which this one success brought him; of his schemes for future glory, and of his endeavors to overcome certain natural impediments to fluent speaking; but I am reminded of the more important work to be done, and regretfully pass over much of more than usual interest. It must, however, be mentioned that just about this time (1816) a Baltimore printer gave to the world a pamphlet containing sketches of certain American orators, which was much talked about in Washington, and was attributed to Mr. Wirt. But a few weeks later the rumor spread abroad, greatly to Gilmer's disgust, that Mr. Wirt's favorite pupil, and not Mr. Wirt himself, was the author. The guilty

young critic could not deny the charge, and gained an enviable reputation in Virginia as a coming man of letters.

In the meantime Gilmer was corresponding with Ticknor, who was now in Göttingen writing warm letters about the progress of German science, and sage letters as to his friend's keeping up his health; with Hugh S. Legaré, whom he had met on his southern trip, and who gives us glimpses of the methods of study which were to lead to his future distinction—with Corrèa, the omniscient, whose careful handwriting it is a pleasure to read; with Mr. Wirt, in answer to that gentleman's elegant epistles of advice; with Tucker in Congress; and with Mr. Jefferson, on subjects of political economy, also on the subject of the boundaries of Louisiana, on which he was writing an article. Jefferson replied that although soon after the acquisition of that country, he had minutely investigated its history and "formed a memoir establishing its boundaries from Perdido to the Rio Bravo" (which papers were sent to the American Commissioner at Madrid, copies remaining, however, in the Secretary of State's office), he had now no documents by him that could help Gilmer. He, however, referred him to an article in the "*Virginia Argus*," of some time in January, 1816, which was so free from errors that he suspected that some one in the Secretary of State's office must have written it. Gilmer corresponded also with the celebrated Du Pont de Nemours (1739–1817), who, after a varied and brilliant life at the French court, had come to New Jersey in 1802 and, disdaining all Napoleon's offers, had resolved to turn his talents to account among a fresh young people—neglecting, however, to learn their language, though he lived among them for fifteen years. Respecting this last correspondence, we will quote a few words from a letter to Mr. Wirt:

"Mr. Corrèa has put me to corresponding with the celebrated Du Pont (de Nemours), who writes the longest letters in French and in the worst hand I ever saw; he writes often, and the correspondence occupies a good deal of my leisure. I shall transcribe his letters in a book, and when we live to quit the

bars and courts and study the history of the strange things which have passed before us, we will read them together."

It will always be one of the regrets of my life that Gilmer did not transcribe the aforesaid letters, for many a weary hour did I spend deciphering them—to find nothing after all very worthy of my pains. They are filled with reflections upon our government not particularly profound—unless the fact that my eyes were nearly blinded by the strain to which they were subjected, blinded my critical powers—with panegyrics on Quesnay and Turgot, whom by the way he induced Gilmer to read, and thus deserves our thanks,<sup>1</sup> with compliments to Gilmer and invitations to him to undertake a translation of a certain treatise on Education, which he had written for the benefit of this uneducated country; with lamentations over the state of France, where the clerical party were beginning that reaction which cost the Bourbons their throne; and with encomiums upon Mr. Jefferson in spite of the fact that that philosopher had allowed the distinguished Frenchman to visit him for a week without once seeing him;<sup>2</sup> from all of which I excerpt one passage and hasten on:

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<sup>1</sup> In this connection I must quote the following from a letter to Wirt: "In economy the French have opened one window and the English another on the opposite side (as the Chevalier Corrèa says), but nobody has seen more than an apartment of the great edifice."

<sup>2</sup> Extract from a letter written by Gilmer to Wirt dated Winchester, January, 1816.

"By the way, this puts me in mind to ask you if the worthy St. Thomas of Canterbury has ever written to you concerning the *clari oratores*. I have always forgotten to mention to you in my letters that I made the application to him, and he treated it as Pope [William Pope, before mentioned] says, in a 'particular manner.' That I might leave a kind of lasting memento to jog his memory, I wrote him a very polite note, mentioning the subject in the best way I could, to which he did me the honor to return no answer, and the matter ended, as I did not think it proper considering the anti-duelling laws to challenge him, as J. Randolph would probably have done. If he has not written to you on the subject, you need take it as no particular negligence towards yourself, as he lately suffered the celebrated



"Such is the system of your elections, imitated from those of England, whose central point is the tavern where Madame Intrigue solicits, pays for and obtains the protection of My Lord Whiskey. You haven't yet got to giving one another blows over the head with great sticks, or to detaching the shoulders from the body with ——(?) as is done at London and Westminster; but already blows of the fist are not spared, and the chiefs of opinion have themselves accompanied by two body-guards—vigorous *Boxers*. This evil may be less great in your Virginia, and it is less great because you have there another evil graver still—all manual labor is done by slaves who have not and who ought not to have a voice in elections. It is to this same evil that you owe, with some justice, what is called 'the Virginian Dynasty.'"

These letters from Du Pont occasioned considerable correspondence between Gilmer and Mr. Jefferson, for the old courtier's French was beyond the dictionaries at Winchester. The treatise on Education was translated, but, for various reasons, was not given to the world.<sup>1</sup>

But the young lawyer was longing for a wider field. He was doing well at Winchester, had in fact made his expenses the first year; but this by no means satisfied him. So Attorney-General Wirt and Chancellor Carr were consulted as to

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Du Pont de Nemours, a grave senator of France, near 80 years of age to visit him at Monticello, stay a week and not see him."

Gilmer refers above to the fact that Wirt found some difficulty in getting Jefferson's opinion as to his life of Patrick Henry. There is another characteristic sentence of Gilmer's on this subject which I take from a letter to Wirt, written on the 16th of December, 1816: "The old citizen of Monticello is such a diplomatist that he has quite baffled our schemes to obtain his opinion; and when we ask him one thing he tells us he 'has reason to believe' something about another. A plague upon all diplomacy, I say."

<sup>1</sup>The French version was published in Paris and had gone through a second edition by 1812. It is to be hoped that Gilmer had the printed book to translate from. For a synopsis of this treatise which is said to have influenced Jefferson's ideas on higher education, see Adams' Thomas Jefferson, &c., pp. 49, 50, 51.

his future location. Wirt decidedly favored Baltimore, but it was found that a rule of court required a three years residence in Maryland, and this unfair protection of native intellect forced the aspirant for legal fame to make a Napoleonic dash, as Wirt called it, to Richmond. This was in the winter of 1817-18.

His first impressions of Richmond were not favorable, and he, therefore, made a flying trip to Baltimore to see whether the rule could not be broken down. Some of his friends there were convinced that an exception would be made in his case; and as Pinckney was likely to be out of the way, either in Russia or in Washington, under the government, there seemed to be a fine opening. But these things were uncertain, and Gilmer returned to Richmond, where, after an abortive attempt to induce some of his friends to go with him to Florida, he finally settled with something like content. It may be noted that he made some endeavors, through Mr. Wirt, to obtain the secretaryship of state for the new territory of Florida; but Mr. Monroe decidedly discouraged the application on the ground that Gilmer ought not to think of thus burying himself—a fact which served to increase the young man's dislike to the "most popular president."

Not long after his return to Richmond, he was appointed by the court to defend one Gibson, who had committed a most atrocious and open murder. The man was convicted, but Gilmer got him a new trial on two nice legal points, and so, in the opinion of his friends, obtained a great victory. We also hear incidentally of a thousand dollar fee for recovering some land in Orange County, of a trip to Georgia for a similar purpose, and of sundry claims given him by Robert Walsh—all of which tends to show that he was by no means idle. Nor was there any lack of appreciation of his work on the part of his friends and acquaintances. There were rumors that President Smith of William and Mary was to be called to Philadelphia in Dr. Wistar's place, and a letter to Jefferson, of March 18th, 1818, hints that Gilmer might be asked to

become the head of his *alma mater*. Jefferson replied on April 10th: "I trust you did not for a moment seriously think of shutting yourself behind the door of William and Mary College. A more complete *cul de sac* could not be proposed to you."<sup>1</sup> We also see from a letter to his brother Peachy, written about a year later, that he stood some chance of being made Attorney General of Virginia.

During this time also (1819-20) he had a correspondence with Benjamin Vaughan (brother to John, of Philadelphia), the antiquarian of Hallowell, Maine, who after many years of good works in England, continued the same in this country until his death in 1835. Vaughan lent him a copy of Smith's General History of Virginia (London Edition, 1629), and the result was that Gilmer induced Dr. Rice to publish the first American edition of this valuable work in 1819. Nor was he idle in the law. He was appointed by the Court of Appeals to report their decisions, and published a thin volume of reports in 1821; but the legislature did not make the office of Reporter profitable enough, and he only served one year.

In the meantime George Hay, a distinguished Richmond lawyer, Monroe's son-in-law, and the prosecutor of Aaron Burr, had published a work against usury laws. Gilmer had read Bentham and the Edinburgh Reviewers on the subject, and disagreeing, published a reply to *them*, disdaining to notice Mr. Hay's performance. This production of his thirtieth year gained many high commendations from such men as Mr. Jefferson, John Randolph of Roanoke. Mr. Wirt, and Rufus King.

From a letter of June 26th, 1820, we find that he was not unknown abroad. A young friend, Dabney Carr Terrell, who had been studying in Geneva, brought him a letter from De Caudolle, the celebrated professor of botany at that University, in which the savan solicited specimens from America, and promised that any observations Gilmer might make should be

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<sup>1</sup>This letter is given entire in Dr. Adams' Monograph on Thomas Jefferson, page 110.

inserted and acknowledged in the great work to which he was devoting his life. The postscript to this letter is as follows:

"It is worth while to mention, too, as an honor done me abroad for what was hardly understood at home—that Pictet, the head of the University at Geneva, translated my theory of the Natural Bridge into French, maintaining it to be the only scientific solution. Terrell said all the learned there spoke in recommendation of it. . . ."

From the above we see that the man was being recognized as successful. His library on general jurisprudence was the best in the state, if not in the whole country, for Ticknor and Terrell had purchased many rare books for him abroad. Strangers as they passed through Baltimore and Washington saw Mr. Wirt and brought letters of introduction from him to Gilmer. Even in Winchester we catch sight of distinguished visitors, such as General Bernard,<sup>1</sup> Napoleon's aide, who gave them vivid descriptions of Waterloo, Dr. Wistar of Philadelphia, and the Abbé. From this last companion Gilmer had now to part, and from the letter I am about to give we see how dear his Virginia friends had been to the rare old man.

FRANK W. GILMER, ESQ.

NEW YORK, 9th November, 1820.

*Dear Sir and Friend,*

Tomorrow in the Albion packet i sail for England, and from thence in January i will sail for Brazil, where i will be in the beginning of March. It is impossible to me to leave this continent without once more turning my eyes to Virginia, to you and Monticello. I leave you my representative in that State, and near the persons who attach me to it, and i doubt not of your acceptance of this charge. Mr. Jefferson, Col. Randolph and his excellent Lady and family, the family i am

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<sup>1</sup> General Simon Bernard (1779-1839)—he seems to have revisited America with Lafayette in 1824.



the most attached to in all America, will receive my adieus from you. Do not forget also that pure and virtuous soul at Montpellier and his Lady. You will i hope live long, my dear friend, and you will every day more and more see with your eyes *what difference exists between the two philosophical Presidents, and the whole future contingent series of chiefs of your nation.*<sup>1</sup> You know the rest of my acquaintances in your noble State, and the degrees of consideration i have for each, and you will distribute my souvenirs in proportion. . . . [He next mentions his election to the Albemarle Agricultural Society and requests Gilmer to return his thanks.]

Glory yourself in being a Virginian, and remember all my discourses about them. It is the lot i would have wished for me if i was a North American, being a South American i am glad to be a Brazilian and you shall hear of what i do for my country if i live.

*Oras ingens iterabimus aquor*—but every where, you will find me constantly and steadily

Your faithful and sincere friend

JOSEPH CORRÈA DE SERRA.

Corrèa did not go to Brazil. The altered condition of Portugal, due to the uprising of 1820, drew him back to his native country, and he became minister of finance under the constitutional government. He died in 1823, after as useful and as varied a life as it is given a man to lead.

But this chapter has already exceeded the limits intended for it, so I shall only mention one other incident and then bring it to a close. On the 25th of October, 1823, Gilmer sent Mr. Jefferson, with his compliments, the six books of Cicero's *De Re Publica*, which had been discovered by the celebrated Italian philologist, Angelo Mai, and published by him in 1822. I had known from his letters that Gilmer was

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<sup>1</sup> It is proper to say that the italics are my own.

fond of the classics and especially of Cicero ; but I was somewhat surprised to find that he kept up with European learning as assiduously as this fact would indicate.

In answer<sup>to</sup> this very letter, it would seem, came the important communication from Mr. Jefferson referred to at the close of the first chapter.

## CHAPTER III.

### THE LAW PROFESSORSHIP.

The letter of November 23d, 1823, in which Mr. Jefferson asked his young friend to act as commissioner for procuring professors from England has not been preserved ; but we have Gilmer's answer of December 3d, which lets us see that something beside the new commission had been offered him. It has already been shown how important the professorship of law was in Mr. Jefferson's eyes ; and we can form some idea of his estimate of Mr. Gilmer's abilities, when we learn that it was now proposed to entrust the chair to him. It would be useless to attempt to describe the young man's gratification : he knew full well what store the philosopher set by this particular chair, and to be so honored at the early age of thirty-three proved even to his naturally despondent nature that his life had not been in vain. But soon the flush of pride passed off, and serious questions began to propose themselves. He had an aptitude for speaking and for public life. He might reasonably look forward to Congress, and Virginians had been known to mount higher. Then the University was as yet *in posse* merely. The men who were to be his colleagues had not been secured ; and, though he himself was to choose them, he did not know whether good men were available at the salaries offered. He had succeeded well at the bar and had long formed plans of retirement with moderate wealth and of devotion to some single theme that should give him an acknowledged position among men of letters. At a new university he would have a constant round of lectures to give,

which would leave little time for outside literary work ; and the prospect of retirement with a fortune would be forever banished from his view. Then, too, he would be bound to continuous duty, with a constitution far from strong and liable to give way at any time. All these considerations weighed well with him, and we accordingly find him requesting time for his decision. But the commission was quite another thing, which he could take in place of his usual trip to the Springs. He had long desired to visit England and now he could go under the best auspices. And so we find him gladly accepting the charge and making some practical suggestions which seem to have been acted on. One of these was that the powers of the agent should not be limited to Great Britain and Ireland, but should be extended to the continent where English letters were beginning to be studied.<sup>1</sup> Mr. Jefferson seems to have removed all absolute restrictions on his agent's movements ; but his preference remained decidedly for England, on account of the difficulties a European would have in thoroughly mastering our language and in appreciating our customs.

The proposal that Gilmer should accept the office of agent to England seems to have been made him by three of the board of visitors without Mr. Jefferson's knowledge. Perhaps the law chair was held up before his eyes by his great friend, Chapman Johnson, although it was well known that Mr. Jefferson would have the deciding voice in that matter. Even as late as January, 1824, Cabell and Cocke seemed to have had no notion that Gilmer was in Mr. Jefferson's mind, as may be seen from the following extract taken from a letter of Cabell's, bearing date the 29th of January, 1824 :

"Gen. Cocke and myself have long been thinking of Chancellor Carr as the Law Professor ; and we would be happy if there could be no commitment on that question. Mr. Carr's happy temper and manners, and dignified character, to say

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<sup>1</sup> Madison's Writings, III, 353.



nothing of his talents and acquirements, induced us to think of him as the head of the institution.”<sup>1</sup>

Although the request that no commitment should be made, might at first blush indicate a suspicion that Mr. Jefferson had some one else in his mind, I do not think that such a suspicion existed, for all of the board regarded Mr. Jefferson as the father of the University, and their own votes as merely marks of honorable confidence in him. I can discover no trace of any self-seeking spirit, certainly not in Cabell or Cocke.<sup>2</sup>

To this letter of Mr. Cabell's, Jefferson made the following answer :

MONTICELLO, *February* 23, 1824.

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I remark what you say on the subject of committing ourselves to any one for the Law appointment. Your caution is perfectly just. I hope, and am certain, that this will be the standing law of discretion and duty with every member of our Board in this and all cases. You know that we have all, from the beginning, considered the high qualifications of our professors as the only means by which we could give to our institution splendor and pre-eminence over all its sister seminaries. The only question, therefore, we can ever ask ourselves, as to any candidate, will be, is he the most highly qualified? The College of ——— has lost its character of primacy by indulging motives of favoritism and nepotism, and by conferring appointments as if the professorships were intrusted to them as provisions for their friends. And even that of Edinburgh, you know, is also much lowered from the same cause. We are next to observe, that a man is not quali-

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<sup>1</sup> Jefferson-Cabell Correspondence, page 289.

<sup>2</sup> But Mr. Madison was acquainted with Mr. Jefferson's purpose, and had from the beginning preferred Gilmer to any of the learned lawyers proposed for the chair, as appears from a letter of his to Jefferson, Nov. 11, 1823. See Madison's Writings, III, 343.

fied for a professor, knowing nothing but merely his own profession. He should be otherwise well educated as to the sciences generally; able to converse understandingly with the scientific men with whom he is associated, and to assist in the councils of the Faculty on any subject of science on which they may have occasion to deliberate. Without this, he will incur their contempt and bring disreputation on the institution. With respect to the professorship you mention, I scarcely know any of our judges personally; but I will name, for example, the late Judge —— who, I believe, was generally admitted to be among the ablest of them. His knowledge was confined to the common law merely, which does not constitute one-half the qualification of a really learned lawyer, much less that of a Professor of Law for an University. And as to any other branches of science, he must have stood mute in the presence of his literary associates, or of any learned strangers or others visiting the University. Would this constitute the splendid stand we propose to take?<sup>1</sup>

The individual named in your letter is one of the best, and to me the dearest of living men. From the death of his father, my most cherished friend, leaving him an infant in the arms of my sister, I have ever looked on him as a son. Yet these are considerations which can never enter into the question of his qualifications as a Professor of the University. Suppose all the chairs filled in similar degree, would that present the object which we have proposed to ourselves, and promised to the liberalities and expectations of our country? In the course of the trusts which I have exercised through life, with powers of appointment, I can say with truth, and unspeakable comfort, that I never did appoint a relation to office, and that merely because I never saw the case in which some one did not offer or occur, better qualified; and I have the most unlimited confidence that in the appointment of

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<sup>1</sup> What would Jefferson say to the specialists now forming our modern faculties?

Professors to our nursling institution, every individual of my associates will look with a single eye to the sublimation of its character, and adopt as our sacred motto, 'detur digniori.' In this way it will honor us, and bless our country. . . ." <sup>1</sup>

It is evident, I think, from the stress laid upon general scientific and literary attainments, that the old diplomat was trying to suggest Gilmer's appointment without being obliged to mention his name or the fact that he had long ago made up his own mind and consulted Gilmer about it.

Be this as it may, Carr's name was taken out of the list of possible appointees by his being elected a judge of the Court of Appeals—a position which his friends had long desired for him, and which he had, doubtless, dreamed about himself. There is a good deal of correspondence about this matter contained in the two volumes before me, and I subjoin a letter from Francis Gilmer to Carr announcing the latter's election. This letter will give a fair sample of the familiar intercourse between Wirt and Carr, and the two Gilmers—Peachy and Francis. I may remark that the office had long been depending upon the death of a once respectable but now superannuated judge, and that some of the letters on the subject remind one strikingly of the magnificent chapter with which "Barchester Towers" begins.

CONFERENCE ROOM CT. APPEALS  
24th *Feby.* 1824

To the honorable Dabney Carr Puisne Judge of the Court of Appeals. It grieveth my heart most noble judge, that in the five years I have lived here, I have been able to do no more for thee, than sound thy praises, for this office, which long due has come at last— Thy merit hath won it, & not the feeble efforts of thy friends. The ballot was thus to-day  
 $\frac{1}{2}$  pas[t] 2 o'clock.

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<sup>1</sup> Jefferson-Cabell Correspondence, page 391. Quoted also by Randall, III, 497.

1st Ballot Carr 90. Barbour<sup>1</sup> 66. Brock<sup>2</sup> 39.

2nd — Carr 114. Barbour 87

Come down as soon as you can.

Your friend,

F. W. GILMER.

It was equally a matter of gratification to Gilmer that Henry St. G. Tucker was chosen to succeed Carr as chancellor of the Winchester district. Thus was fulfilled that remarkable prophecy mentioned by Kennedy in his life of Wirt. Wirt had long ago been made Attorney General, James Barbour had been sent to the Senate and was soon to be Secretary of War, and Dabney Carr was judge of the Court of Appeals.<sup>3</sup>

It had been resolved to keep Gilmer's mission a secret, for fear that American patriotism would howl down the newly-built walls of the University as soon as it was known that British voices would be heard therein. Few letters were written about it, but they show incidentally that the young agent went up to Albemarle early in the spring of 1824 and there held many consultations with his chief, in which Mr. Madison of course shared. But even then the newspapers got some inkling of what was going on, and we find in the *Richmond Enquirer* for May 18th, 1824, the following item in very small type: "Mr. F. W. Gilmer of this city has sailed for England, it is said, to make arrangements (for library, apparatus, &c.) to put the University of Virginia into immediate operation." It was then deemed best to put a bold face on

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<sup>1</sup> P. P. Barbour of Orange County, previously Speaker of the House of Representatives, afterwards Associate Justice of the Supreme Court of the United States. •

<sup>2</sup> Wm. Brockenborough, then a judge of the General Court. In ten years he took his seat beside Carr as a judge of the Court of Appeals.

<sup>3</sup> In one of their trips to the Fluvanna court, James Barbour began taking off the peculiarities of his companions and wound up by predicting that they would rise to the offices mentioned in the text. See Kennedy's *Life of Wirt*, I, 71.



the matter and to enter into explanations. Accordingly in the same newspaper for May 25th, Gen. Cocke gave a notice of the progress of the University, in which he stated that an agent had gone to England for professors, but laid great stress on the fact that the chairs of government and morals had been reserved for native Americans.

In the meantime, however, Mr. Gilmer had hurried through Washington "incog," as he expressed it to Mr. Wirt, and, arriving in New York, had sailed early on the morning of May the 8th on the packet *Cortes*, bound for Liverpool.

I shall end this chapter by requesting the reader to imagine him pacing the deck and laughing at sea-sickness, longing to catch sight of the English shore and wondering whether the reality would equal his dreams—also perhaps glancing over his papers, among which lay letters of introduction from both Madison and Jefferson<sup>1</sup> to Richard Rush, our Minister at London.<sup>2</sup>

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<sup>1</sup> These letters are to be found in Madison's Writings, III, 437, and Randall's Life of Jefferson, III, 497.

In Jefferson's letter Gilmer is mentioned as "the best educated subject we have raised since the Revolution; highly qualified in all the important branches of science, professing particularly that of the Law, which he has practised some years at our Supreme Court with good success and flattering prospects." Jefferson goes on to say that he does not expect to get such men as Cullen and Robertson and Porson, but he hopes to get the men who are treading on their heels, and who may prefer certain success in America to uncertain success in England.

<sup>2</sup> This gentleman (1780-1859) was a son of the well known Dr. Benjamin Rush and filled the offices of Attorney General of the United States, of temporary Secretary of State, of Minister to England (1817-25), of Secretary of the Treasury under John Quincy Adams, and Minister to France. He was also the author of "Memoranda of a Resident at the Court of St. James," &c. The edition of 1845 does not mention Gilmer's visit.

## CHAPTER IV.

### THE MISSION.

On Sunday, the 6th of June, 1824, Mr. Gilmer found himself in Liverpool. His first task was to write to Mr. Jefferson of his safe arrival. We may imagine the pleasure it gave the old gentleman to receive this short epistle on the 29th of July, and to sit in his library with the precious missive in his hands indulging pleasant day-dreams about the child of his old age. Professors and a library were now all he wanted and for these he depended on Gilmer alone; for his own life was evidently drawing to a close, and if anything happened to this agent, he might not live to see his University opened and to say his "*nunc dimittis*." The letter was, as I have said, a short one. The ship had been twenty-six days making from New York to Holyhead. For six days they had been driven about by adverse gales in St. George's channel, and Gilmer had in despair disembarked at Holyhead and gone through Wales to Liverpool. He went to Liverpool instead of London for business purposes which the letter does not explain.

The next communication with Mr. Jefferson is from London and bears the date of June 21st. I shall now let Mr. Gilmer tell his own story, only adding such facts and explanations as seem to be important.<sup>1</sup>

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<sup>1</sup> In the letters which follow I have not consciously made any alterations except occasionally in punctuation and in substituting full for abbreviated forms.

LONDON, 21st June, 1824.

*Dear Sir.*

I wrote to you at Liverpool informing you of my arrival on the sixth. Hatton lying immediately in my way to London, I determined to call on Dr. Parr; unluckily for me, he had gone to Shrewsbury, and I shall be obliged to visit Hatton again, before I go to Oxford.

Since my arrival in London eight days ago, Mr. Rush (who is soon to return to the U. S.) has been so constantly engaged, that he could do nothing for me till yesterday. Indeed, the persons with whom he was to act, have been equally occupied in Parliament, the session being near its close, and as with us, the business of weeks is crowded into the few last days. Yesterday (Sunday) I received the necessary letters to Cambridge, Oxford, and Edinburgh, from Lord Teignmouth<sup>1</sup> and Mr. Brougham, Sir James Mackintosh being so occupied with the London and Manchester petitions for the recognition of the Independence of S. America that he has done nothing for us. I have conversed both with Lord T. and Mr. Brougham, who have both taken a lively interest in the object of my mission; the latter especially is very ardent for our success.

Finding no specific objection, nor indeed any objection, to Dr. Blaetterman[n], I have closed the engagement with him, as I considered myself instructed to do. He will sustain a considerable loss by his removal, having recently taken and furnished a large house. I did not therefore hesitate to offer him in the outset \$1500 for the first year, with an intimation that he would probably be reduced to \$1000 in the second, but leaving that entirely to the Visitors, preferring to make positive stipulations for the shortest possible time. Nor did I hint even anything of the guarantee of \$2500.

Having thus concluded my arrangements in London, I shall set out to-morrow for Cambridge, where my real difficulties

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<sup>1</sup> John Shore—Lord Teignmouth (1751–1834)—was an Indian official of some distinction, but is best known as the Editor of Sir Wm. Jones' works.

will begin, and where they will be greatest. I have anticipated all along that it would be most difficult to procure a fit mathematician and experimental philosopher; for both are in great demand in Europe. Mr. Brougham intimated that it was by no means improbable, that Ivory<sup>1</sup> (the first mathematician without rival in G. B.) might be induced to engage for us: and I should certainly have gone at once to Woolwich to see him; but he accompanied the statement by remarking that he had recently been a good deal disordered in his mind and unable to attend to his studies. He had recovered, but there is always danger of a recurrence of these maladies. Say nothing of this, however; for I may find this account exaggerated, or wholly untrue, and may hereafter confer with Ivory, and possibly contract with him.

I can do nothing about the books and apparatus till I have engaged professors; all that part of my undertaking is therefore deferred until my return to London. I have seen Lackington's<sup>2</sup> successors, and endeavoured to impress upon them the importance of attention and moderate charges in their dealings with us.

You will hear from me again from Cambridge; accept therefore I pray you my best wishes.

P. S. Blaetterman[n] is in the prime of life—has a wife and two small children, and they appear amiable and domestic:<sup>3</sup> he speaks English well, tho' not without a foreign accent;

<sup>1</sup>James Ivory (1765–1842) was educated at the University of St. Andrews, and, after studying theology and drifting from teaching to superintending a flax spinning factory, was, in consequence of his remarkable memoirs on mathematical subjects, appointed professor of that study in the Royal Military Academy at Marlow. This Gilmer mistook for Woolwich, and consequently he never found Ivory, who had resigned his professorship in 1819. Brougham continued to be Ivory's friend, for in 1831 he got him a pension of £300. See *Gentleman's Mag.*, May, 1843, p. 537.

<sup>2</sup>Booksellers recommended by Mr. Jefferson.

<sup>3</sup>I could not help smiling on reading this ingenuous remark, for I remembered to have heard that Dr. B. was afterwards dismissed from the University for beating his wife. I do not know whether this report was



that we are obliged to encounter every way, as there are no profound English professors of modern language[s].

It appears from this letter, and from the letter of introduction to Rush, that Mr. Jefferson already knew of Dr. George Blaettermann, and that Gilmer went prepared to engage him, if possible, as professor of modern languages. Of Dr. Blaettermann's antecedents I have been unable to procure any information. Recommendations of the man appear to have been sent to Jefferson by George Ticknor as early as 1819.

Although Mr. Rush was very busy, he managed to find time to write Gilmer a long letter on the 16th of June in which he states that he had written to the three distinguished men mentioned in the letter just given, and that although Mr. Jefferson had overrated his ability to be of use to Mr. Gilmer, his disposition to be so used could not be overrated. Lord Teignmouth in replying to Mr. Rush on the date last mentioned enclosed four letters of recommendation, to two representative men at Oxford and Cambridge respectively. Three of these letters were written by his son in their joint names, the fourth was addressed by Lord Teignmouth himself to Dr. Coplestone (whose name he misspells) at Oxford. His lordship's courteous note hardly needs to be inserted. Dr. Edward Coplestone (1776-1849), afterwards Bishop of Llandaff and one of the first English clergymen to learn Welsh that his congregation might understand him, was at this time Provost of Oriel. Gilmer could not have been referred to a better man; but as the letter in which he describes his visit to Oxford, does not mention Dr. Coplestone, it is possible that the two did not meet. Coplestone could have given him excellent advice as to his selection of a classical professor; for he had himself

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true, but it bears a curious relation to the story told about his successor, another foreigner, who was forced to leave because his wife beat *him*.

defended elegant classical scholarship against the Edinburgh reviewers.<sup>1</sup>

Brougham's note to Mr. Rush I give in full.

HILL ST., *Saturday.*

*My dear Sir—*

I am extremely sorry that I have not been able sooner to answer your very interesting letter—inclosing one from your truly venerable friend—I feel the liveliest interest in the success of Mr. G's mission—which is of great importance to both countries—but the difficulty is not small which Mr. Jefferson most sagaciously points out. I have inclosed three letters to the fittest persons at Cambridge & Edinburgh. At the latter place I am quite sure, he ought to say nothing to any one—but quietly go to Mr. Murray<sup>2</sup>—who intimately knows all the learned men there—& in whose judgement and honour he may safely trust. As for Cambridge, Dr. Davy<sup>3</sup>—the master of Caius College to whom I give him a letter, is now in London & will be here for two days longer—I shall see him to-morrow & consult him generally upon the subject—& if Mr. G. could be kind enough to call here to-morrow morning soon after eleven, I could take him to the Dr.—and I should beside, be

<sup>1</sup> I must once for all acknowledge my indebtedness to Mr. Leslie Stephen's wonderful Dictionary of National Biography. I have drawn from it whenever I could. Appleton's Cyclopædia of American Biography and Drake's American Biography have also been of service to me. I have indicated other sources of information where they seemed important.

<sup>2</sup> Undoubtedly Mr. John A. Murray, the eminent Whig lawyer, co-editor at one time of the Edinburgh Review, Clerk of the Pipe (a sinecure which got him a slap from Christopher North in the *Noctes*) and afterwards a Scotch Justice. Lord Murray's hospitality is amply testified to. It will be seen that he was very kind to Gilmer. (See Mrs. Gordon's "Christopher North," New York, 1875, page 387.)

<sup>3</sup> Dr. Martin Davy (1763–1839) was a successful physician who was made Master of Caius in 1803. In spite of some questionable proceedings, he is considered to have been a good master upon the whole. He was a strong Whig and a great friend of Dr. Parr's.

desirous of seeing him & putting him on his guard against the various deceptions or rather *exaggerations* which will be practised upon him—if he lets the object of his mission be known to any but a very few.

Believe me to be,

Wt. great respect

and esteem

Your faithful Serv't

H. BROUGHAM.

From the execrable hand and the constant abbreviations to be seen in this note one might infer, even if one did not know it already, that Mr. Brougham was then the busiest man in London.

In the meantime Mr. Jefferson had written Gilmer a letter, which though not received until later, may as well be inserted here.

MONTICELLO, *June 5, '24.*

*Dear Sir.*

The printer having disappointed me in getting ready, in time to send to you before your departure, the original report of the plan of the University, I now inclose you half a dozen copies, one for Dr. Stuart [he meant Dugald Stewart], the others to be disposed of as you please. I am sorry to inform you that we fail in getting the contingent donation of 50 M. D. [\$50,000] made to us by our last legislature. so we have nothing more to buy books or apparatus. I cannot help hoping however that the next session will feel an incumbency on themselves to make it good otherwise. an easy mode may occur. W<sup>m</sup> and Mary college, reduced to 11 students, and to the determination to shut their doors on the opening of ours, are disposed to petition the next legislature to remove them to Richmond. it is more reasonable to expect they will consolidate them with the University. this would add about 6 M. D. a year to our revenue.

Soon after you left us, I received from Maj<sup>r</sup> Cartwright, a well-known character in England, a letter, and a volume on the English constitution. having to answer his letter, I put it under your cover, with a wish you could deliver it in person. it will probably be acceptable to yourself to have some personal acquaintance with this veteran and virtuous patriot; and it is possible he may be useful to you, as the favorable sentiments he expresses towards our University assure me he would willingly be. perhaps he would accept a copy of the Report, which I would ask you to present him in my name. ever & affectionately yours

TH: JEFFERSON.

On the back of this is endorsed, "Received Cambridge, 14th July, 1824—without the pamphlets, so could not take one to D. Stewart." But the reports seem to have come later.

Gilmer now left London for Cambridge from which place he wrote the following letter to Mr. Jefferson :

CAMBRIDGE, 7th July, 1824.

*Dear Sir,*

I left London for this place on the 22d of June, immediately I had procured from Mr. Rush the necessary letters. I found on my arrival here the same evening that the long vacation at the University had virtually commenced three weeks before, that is while I was at sea. Of the three persons to whom I had letters, he, on whom Mr. Brougham principally relied, was absent on a visit of a week.<sup>1</sup> I employed the time as well as I could, in enquiring into the state of learning here, and what in this dilemma would be my best method of proceeding. I found natural history very little attended to, and should therefore be content to procure a Mathematician and Natural Philosopher from this University, indeed from what I can learn, there are no particular reasons for preferring the Professor of experimental philosophy from

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<sup>1</sup> Dr. Davy.



Cambridge. But they from whom I should have had some chance of selecting fit persons, had, in all the departments of learning, gone to their various homes in different parts of the kingdom. This puts me in some respects to great disadvantage, for I shall have to travel a vast deal to see them. As yet I have learned but of one, whom I should probably choose, that is a Mr. Atkinson,<sup>1</sup> formerly "Wrangler" in Trinity College, Cambridge, now teaching a school in Scotland. He is spoken of as a first rate mathematician, and I shall endeavor to see him in my visit to Scotland.

For the teacher of ancient languages two have been suggested, both residing in London. I defer acting on that branch, until I visit Oxford and see Dr. Parr. Sir James Edw. Smith is at the head of natural history in England, and he was in Norfolk when I was in London—as he is now. Being nearer him than I shall be again in my regular route, I shall spend part of a day with him, proceed to Oxford, and then to Edinburgh. It seemed to be thought most probable that our Professor of natural history will be best found in Scotland, or at London, tho' we shall any where find it difficult to procure one learned both in botany and zoology. From what I hear our Professor of medicine shall probably come also from London, but I shall form no opinion of this, until I see Edinburgh. After remaining sometime at Oxford and Edinburgh, I shall return to London, as a central point, and make short excursions as I may find necessary, in order to complete the important object of my mission. I shall forbear to give any general opinion until I have seen Oxford and Edinburgh.

The manner of my reception at Cambridge has softened my profound respect and veneration for the most renowned

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<sup>1</sup> Henry Atkinson (1781–1829) of Newcastle on Tyne is the only Atkinson of mathematical celebrity that I can discover. He did teach in Scotland; but he does not appear ever to have been at Cambridge; for at the age of thirteen he was principal of a school!

University in the world into a warm esteem for all connected with it. From the Bishop of Bristol<sup>1</sup> and Dr. Davy down to the undergraduates, all have vied with each other in the profusion and delicacy of their civilities. I have dined more than half the days in the Hall of Trinity College, the most famous of all, and was delighted with the urbanity and good breeding of the fellows, students and of every one who appeared. The tone of feeling in England is undoubtedly favorable to us of the U. S. I have heard every where the warmest expressions of friendship for us, and have certainly received every civility possible. At the great festival at the College yesterday, every one with whom I conversed enquired with the utmost earnestness into the different departments of our affairs; the Lawyers are beginning to read our reports, the courts and even the Parliament have in several things followed, and somewhat boastfully, I may say, our example. I am very glad of all this; for now we have grown beyond the reach of this enormous creature, at once a Leviathan and a Lion, there is no good in keeping alive angry feelings.

Mr. Brougham enquired about you with the greatest interest. I shall write you again from Oxford, &c.

I do not know whether the proposed visit was made to Sir James Edward Smith. If Gilmer did not see the latter gentleman, then within four years of his death, we may be sure that he relinquished the visit with disappointment, for Sir James was the most distinguished botanist in England, having been the founder of the Linnæan Society, and botany had always been Gilmer's favorite study. We shall see hereafter that this trip to Cambridge was successful in more than a social sense, for by it Gilmer was enabled to secure two of the best of the first professors.

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<sup>1</sup> Dr. J. Kaye (1783-1853) had become Bishop of Bristol on the death of Dr. Mausele in 1820. He had been Master of Christ's College and Regius Professor of Divinity. I may remark that Dr. Christopher Wordsworth was at this time Master of Trinity.

The promised letter from Oxford does not seem to have been written, but in the meantime we have two letters of a more personal nature which seem worthy of presentation and require no comments.

The first is to his brother, Peachy Gilmer, and I deem it proper to say that I have not had time to verify any of Gilmer's statements, except such as are germane to the subject of this essay.

BOSTON, 2 *July*, 1824.

*My dear brother,*

(Lincolnshire.)

This is the place our Boston of Massachusetts was called after. The daughter has outgrown the mother. This is a very small town, on a very small stream, what we would call a creek, here dignified with the name of river, with very small trade, and in short with nothing large about it, except a most enormous tower to the church, which I came here principally to see. For when I got to Cambridge, I found one of the principal persons I was to consult with, absent for some days, and not to lose the time, I took a small circuit to Peterborough, Lincoln, and Boston, passing in my way thro' Stilton, famous for chesees, a village not as large as Liberty.<sup>1</sup>

Lincoln is of great antiquity, and has one of the finest Cathedrals in England. The site of it (the Cathedral) too is beautiful—it stands on an eminence higher and more abrupt than the capitol hill of Richmond—all around is one vast plain, till lately a fen, reclaimed and now a lovely meadow. The town of Lincoln is no great matter; here, too, is a tower of W<sup>m</sup>. the Conqueror,—a palace of John of Gaunt, a Roman court, with chequered pavement, &c. From Lincoln I descended the Witham to this place. The Witham is about as large as the canal near the basin; it flows thro' an unbroken meadow, not of great fertility, nor at all beautiful, or pictur-

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<sup>1</sup> Peachy Gilmer lived for some years at Liberty, a small town in Bedford county, Va.

esque, tho' you see steeples and towers on all sides. The country of Lincoln is richer in old buildings than any part of England, but the country was by nature, I think, not generally fertile, something like those cold, iron-ore bogs we sometimes have, black and of rich appearance, but of no life or strength.

My reception at Cambridge was what has given me most pleasure. . . . I have been really domesticated (& was invited to take rooms) in Trinity College, the most renowned without doubt in the world. It is the favorite College of the nobility and gentry of England—here were educated Bacon, Coke, Harvey, Newton, Cotes, Cowley, Dryden, &c. &c. They shewed MS. letters of Newton, and several of the interlined originals of Milton's smaller Poems, part of his original *Paradise Lost*, &c. &c., and at Christ's College (which was Milton's) the Bishop of Bristol shewed me the mulberry tree Milton planted; a fine bust of him, and many curious things else. I walked moreover to Granchester, (2 miles from Cambridge) supposed to be the country church yard, Gray had in mind, in his immortal elegy. It was ever a favorite walk with Gray, lying thro' hedges, covered with wild roses and briars, a meadow on the margin of the Cam—I heard "the Curfew toll the knell of parting day" at 9 o'clock. But all this did not give one-half the pleasure I have derived a thousand times from repeating the elegy, in hours of "lonely contemplation," which heaven has given me in kindness or in wrath, God knows which. I go to-morrow to Cambridge, thence to Oxford, thence to Edinburgh.

The eastern side of England is not beautiful, and with all those noble steeples and towers, but for Cambridge, I should have found small pleasure since I left London. The country west of London was every where (except Staffordshire) most enchanting; tho' by nature rather less fertile, I think, than I have heard it represented. I was at the House of Commons, the Courts, Westminster Abbey, (which has nothing but Henry VII's Chapel and its awful history to interest me) and every



where, but I hate descriptive writing and descriptive reading, but not descriptive talking, so I will give you the whole when we meet.

I saw J. Randolph in London—looking badly. You will think it strange, fondly treated as I was at Cambridge, that I should think of returning. I assure you I already begin to languish for Virginia. I never liked being jostled from place to place—crowds or strangers—here are all. Since I left London, I have not seen a single person. I have found John Bull far more civil every where than he is represented to be. The tone of manners in the higher walks, is exactly what I have seen in Virginia. McClurg, John Walker, old Mr. Fleming<sup>1</sup> &c. were fully as elegant as Lord Teignmouth or Lord Bishop of Bristol &c. but not more so, for the manners of all were unexceptionable. There is less dashing than you suppose, less pretension than with the *new-born gentility* of the Eastern States.

I do not know when I may have leisure to write again. I am detained a day here for a coach, and calling you all to mind & heart, I could not resist the temptation of addressing a few words to you. . . . .

The next is to Mr. Wirt and has been taken from Kennedy's Life (Vol. II, 187.)

July 16, 1824.

*My dear Mr. Wirt,*

I write you my first letter from England, not from Warwick Castle or Guy's Cliff,—which are both near at hand—nor from Stratford generally, but from the identical room in which the immortal bard first came “into this breathing

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<sup>1</sup> Fleming was, possibly, the judge whom Dabney Carr succeeded. Walker I do not know of—unless he was the John Walker who was appointed to succeed Grayson in the Senate in 1790. As I cannot ascertain the date of this Walker's death, the point must remain in doubt, but from an expression used in another letter I am inclined to think that he was the man.

world." Here day first dawned upon his infant eyes—a miserable hovel. Imagine in that hovel a small room, with a low roof; but one window,—that looking to the setting sun; a fire-place advanced into the room, by the naked chimney coming through the floor. The house is neither wood nor brick, but a wooden frame with the intervals filled up with brick. The wooden beams are shrunk and warped by weather and time. On the lower floor is a butcher's stall. Nowhere is there a single vestige of Shakespeare. His chair is gone. His mulberry tree, which was in the garden, is attached to another house; it is reduced to the last fibre. Except his will, and the walls and beams of this lowly mansion, I know of no object in existence which he touched. Here the wise and the great repair to worship him. In the register before me is the name of Sir Walter Scott among other less illustrious. The walls were once scribbled over by men of genius and fame—Fox, Pitt, and others,—but a mischievous tenant lately whitewashed them, and you see only what have been recently written.

His body lies near the altar in the church, and neither name, nor date, nor arms appear upon the stone; conclusive circumstances, I think, to show that he wrote the epitaph which is sculptured upon the stone. This has been doubted. What but the modesty of his own great mind could limit the epitaph of Shakespeare to the expression of the simple wish that his bones might rest undisturbed in their last repository? We have seen the lines in Johnson's life of him, but here is a *fac simile*:<sup>1</sup>

I inquired of half a dozen persons in Stratford for the tomb of Shakespeare before I could find it. I should not have been surprised if this had occurred in a search for the tomb of Newton or Milton. But I was amazed at its happening in the case of the poet of all ages and conditions.

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<sup>1</sup> Here follow the well-known lines.

I begin to be impatient to see Virginia once more. It is more like England than any other part of the United States—slavery *non obstante*. Remove that stain, blacker than the Ethiopian's skin, and annihilate our political schemers, and it would be the fairest realm on which the sun ever shone. I like the elbow room we have, where the wild deer cross the untrodden grass, and the original forest never heard the echo of the woodman's axe. There is nothing in England so beautiful as the scenery of Albemarle, or the view from Montevideo—the window from which you used to gaze on the deep blue depth of these [those?] silent and boundless mountains.

Peace to them!—and a blessing warm, though from afar, on you and all your house!

Yours affectionately,

F. W. GILMER.

Having tarried some days in Oxford, Gilmer went to pay his respects to Dr. Parr, to whom Mr. Jefferson had given him a letter and from whom he expected much assistance in his choice of a classical professor. Nearly everyone has heard of Dr. Parr, scarcely anyone has read a line of what he wrote. He was now in his seventy-seventh year, and, we may not doubt, wore his wig as of old, smoked shag tobacco, and talked about how narrowly he escaped being made a bishop. But to the reader of De Quincey and of the *Noctes Ambrosianae* any description I can give of this quaint old scholar, who certainly knew more Latin than any man living, will seem lame and borrowed; so, presuming that my readers have read the *Noctes*, I shall merely remark that Gilmer called upon him on the 17th of July, but found him setting out "on his travels," which proved not extensive as he sent Gilmer a note inviting him to come back the next morning. The handwriting in this note is only equalled by that of the celebrated Du Pont. Our next letter is to Mr. Jefferson, written from Dr. Parr's:

HATTON, *July 20th*, 1824.

*Dear Sir.*

Doctor Parr (Samuel) was delighted with your letter, and received me with the greatest kindness: I have now been two days with him. Tho' not above 76 years of age, I soon discovered that he was too infirm, to be of much service to us in the selection of professors. Tho' he is our decided and warm friend, my interview with him has been the most discouraging. He has however been of great service, by assisting me in forming a catalogue of classical Books for the university.

I found at Oxford as at Cambridge, that Professors and students, had all gone to their summer residence, and I could consequently make no inquiries at all there. I have now however, seen enough of England, and learned enough of the two universities, to see, that the difficulties we have to encounter, are greater even than we supposed; not so much from the variety of applications, as from the difficulty of inducing men of real abilities to accept our offer. By far the greater portion of any assembly so numerous as that which fills the walls of Oxford and Cambridge, must of course be composed of persons of very moderate capacity. Education at the Universities has become so expensive, that it is almost exclusively confined to the nobility and the opulent gentry, no one of whom could we expect to engage. Of the few persons at Oxford, or Cambridge, who have any extraordinary talent, I believe 99 out of 100, are designed for the profession of law, the gown, or aspire to political distinction; and it would be difficult to persuade one of these, even if poor, to repress so far the impulse of youthful ambition as to accept a professorship in a college in an unknown country. They who are less aspiring, who have learning, are caught up at an early period in their several colleges; soon become fellows, & hope to be masters, which with the apartments, garden, and 4. 5. or 600 £ sterling a year, comprises all they can imagine of comfort or happiness. Just at this time too, there are building at Cambridge, two very large colleges



attached to Trinity, and King's, which will be the most splendid of all. This creates a new demand for professors, and raises new hopes in the graduates.

All these difficulties are multiplied by the system we have been compelled to adopt in accumulation [accumulating] so many burthens on one professor. To all the branches of natural philosophy, to add chemistry and astronomy, each of very great compass, strikes them here with amazement.

The unprecedented length of the session you propose, is also a dismaying circumstance. As this will probably be altered in time, it is, I think, to be regretted that we had not begun with longer vacations. At Cambridge and Oxford there are three vacations. The longest is from about the 1st July to the 10th October, altogether there is a holiday of near 5 months. I inquired at Cambridge if there was any good reason for this long recess. They answered, "It is indispensable: no one could study in such hot weather." . . . . "It is necessary to refresh the constitution, oppressed by the continued application of many months," &c. If the heat be insufferable in England, what must it be in our July, August, &c when there is to be no vacation?

I see distinctly that it will be wholly impossible to procure professors *from either University*, by the time you wished. Whether I can find them elsewhere in England, is most doubtful; in time I fear not. I shall not return without engaging them, if they are to be had, in G. B. or Germany. I have serious thoughts of trying Göttingen, where the late political persecutions of men of letters will naturally incline them to us and where classical literature, at least, is highly cultivated. Dr. Parr seems to prefer this course, but I shall not be hasty in adopting it, as I fear the want of our language will prove a great obstacle. [Here he makes some remarks about his personal expenses being greater than he had supposed and requests that the Board of Visitors forward another bill.]

I set out for Edinburgh to-morrow, shall remain there as long as I find any advantage to our object, in doing so, and

shall return to London. There I shall be able to learn whether I had best go to Germany, seek English scholars in the country, or quietly wait till the Universities open in October which would delay any final contract till December or January. I am not disheartened—at least we must keep things well, to present a good front to the next legislature. That I shall do, if possible.

I received your letter to Maj<sup>r</sup> Cartwright while at Cambridge. I have not been to London since. &c.

Leaving Hatton on the 21st of July, Gilmer was in Edinburgh by the 25th, on which day he received a letter, in answer to one of his own, from a young man he had met and taken a fancy to in Cambridge. This was no other than Thomas Hewett Key, first professor of mathematics in the University of Virginia. Mr. Key was at this time in his 26th year and a master of arts of Trinity College, Cambridge. For two years past he had been applying himself to the study of medicine, but Gilmer, having met him at the rooms of Mr. Praed at Cambridge [evidently the exquisite society poet—Winthrop Mackworth Praed] perceived his fine scientific gifts and invited him by letter to become a member of the faculty. Key's answer (written from London on the 23rd of July) is now before me and runs as follows:

FRIDAY, *July* 23, 1824,

39 Lombard St., London.<sup>1</sup>

*Dear Sir,*

Let me first apologize to you for any delay I may appear to have been guilty of in not sending a more early answer to

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<sup>1</sup>The two letters from Key and Long which I have inserted may vary slightly from the originals because they were intrusted to a stupid copyist whose stupidity was not discovered until the MSS. volumes had passed out of my possession. The variations are, I am certain, unimportant. All the other letters were either copied directly by myself or had my personal revision.

the letter I had the pleasure of receiving from you. Not finding me at Cambridge which I had left the same morning with yourself, it was forwarded to my residence in town; and as I took rather a circuitous route homewards, it was not till two days after its arrival that it first came to my hands.

The first opportunity I had after the receipt of it, I communicated the contents to my Father under whose roof I am living; and lost no time in consulting with him on the propriety of accepting your proposal. And before I say a word more, you must allow me to thank you for the very handsome and indeed too flattering manner in which that proposal has been made to me. And, while I express myself proud of the favourable light in which you are pleased to view me, I assure you that the feeling is at least reciprocal. I had always the utmost respect for your country; and, believe me, that it has been highly gratifying to me to find that opinion more than justified by the first of her sons whom I have ever had the pleasure to meet. I have been now for two years applying the greater part of my time to the study of medicine; and had, reluctantly indeed, made the determination to withdraw myself almost wholly from the pursuit of pure science and literature. Indeed nothing but your liberal proposition would have induced me once more to turn my thoughts to that quarter. You will allow then that it is natural for one, who has devoted so much of his time and no inconsiderable expense to the study of an arduous profession, to pause; and weigh well every part of a proposal, which calls on him at once to sacrifice all the progress he has made, and to embark again in a perfectly new course. And this caution is the more requisite on the present occasion, since the mere distance would render it difficult for me, in the case of disappointment, to retrace my steps. Of course in the short limits of a letter it is impossible for either of us to say much; and consequently in my present imperfect acquaintance with the detail of your offer it must be out of my power to come to any final arrangement till the time when we meet in town, I will in the mean while state

generally what my feelings on the question are and leave you to judge how far we are likely ultimately to coincide. I own I have my share of ambition ; and every one who is not to be numbered in the class of fools or rogues will confess as much ; at the same time that ambition is of a character which is far from inconsistent with promoting the happiness of others. I have already said that I am fondly attached to the sciences ; and the strength of that attachment is proportional to each, as it appears to me calculated to advance the interests of mankind. In the university of Cambridge I have often thought that this object is too much lost sight of ; and that the great body of talent in that seat of knowledge is frequently directed to points of comparatively minor importance, and thus in a great measure thrown away whilst it might be employed in a manner so highly beneficial both for England and the whole world. It was a strong feeling of this kind, which, on the last night I had the pleasure of meeting you, led me perhaps to be too warm in the observations I made ; but I know not whether such warmth was not justifiable. At any rate I had the pleasure of knowing that what I then said had the effect of directing the thoughts of one gentleman who was present to my favorite subject of Political Economy ; and that gentlemen (I mean Mr. Drinkwater<sup>1</sup>) one whose talents I have the highest respect for. Having these views of the real objects of science, and actuated by an ambition which seeks, as far as my poor means are able, to add to the sum total of human happiness not merely in my own country but generally, I shall be most happy, should I find it in my power finally to agree to your offer. The manners, habits, and sentiments of the country will of course be congenial with my own ; and there can be little fear of my finding

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<sup>1</sup> Mr. John Eliot Drinkwater-Bethune (1801-1851), son of the historian of the Siege of Gibraltar, was afterwards counsel to the Home Office and an Indian official of high standing. He is chiefly remembered in connection with his labors for the education of native girls of the higher castes.



myself unhappy in the society I am likely to meet with, considering the favourable specimen I have already seen. Nor would it at all grieve me in a Political point of view to become, if I may be allowed that honour, a Citizen of the United States. With all these prepossessions in favour of your proposal, it remains for me only to enquire into the particular nature of the appointment you have so kindly offered me. I would wait till you return to town for the explanations you have there promised; but of course it must be unpleasant to both of us to remain in suspense, and you will look on it as not impertinent, but rather as a proof how eager I am to arrive at a final determination, if I put the following queries. 1<sup>st</sup>. What branch or branches of science you would wish me to devote my services to. 2<sup>dly</sup>. What duties I should have to perform; How far I should be at liberty to form my own plan of promoting that science; How far I should be under the direction of others and of whom; How far I should have the control of my own time. And if to this you could add an account of the existing state of the University, of its government, the average number, age, and pursuits of the students &c., you would do much to enable me to come to a decisive conclusion. It will of course be impossible to reply fully to these questions; and perhaps you can refer me to some person in town, to whom I may apply for immediate information; which would be far preferable to the slow and necessarily confined channel of the Post Office. I trust too you will not think me guilty of any indelicacy if I ask how far the University has given you authority to make any private arrangement and whether any agreement between us will not require some form of ratification in Virginia. On reference to the maps I find that Charlottesville is the Capital of Albemarle county and that it is situated a considerable distance up the country. This of course must add much to the expense of my removal from this place to the University of Virginia and as this expense at the outset is a consideration of some importance to my

empty purse I should be obliged to you if you could furnish me with an idea of it; and whether the University would be willing to diminish the weight of it. There are of course many other questions which on a little more reflection would suggest themselves to me; but I fear I have already drawn too largely on your time and patience. I will therefore conclude with assuring you that

I am, with the greatest consideration, your obliged servant,

THOMAS HEWETT KEY.

On the evening we met at Mr. Praed's, I remember to have offered you a letter to Mr. McCulloh,<sup>1</sup> who lately lectured in town on Political Economy. It did not then occur to me that Mr. M. is at this moment repeating his course at Liverpool, and that consequently you are not likely to meet with him at Edinburgh. I shall, of course, obey your wish that the communications between us should be held secret; and in consulting with my Father, you will perceive that I have violated only the letter of your request.

Gilmer answered this letter on the 26th, as follows:

EDINBURGH, 26th July, 1824.

*Dear Sir,*

I have this morning received your letter of the 23d. and am gratified to find the temper of it just what I expected from you. I was aware that my proposition would require both time and examination into detail, and I therefore limited it to the general question in my former letter. I now take great pleasure in answering the enquiries you make, so far as the compass of a letter allows me; I shall with equal satisfaction enter into fuller explanations when I see you in London, which I hope will be about the middle of August.

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<sup>1</sup>Mr. MacCulloch published his "Principles of Political Economy" about a year after this was written.

The Professorship which I supposed you would most willingly accept, as that for which your studies and predelections most eminently fitted you, is the chair of mathematics. We should require in the professor a competent knowledge of this science to teach it in all its branches to the full extent to which they have been explored and demonstrated in Europe—the differential calculus—its application to physics, the problem of the three bodies, &c., &c.

*As to public utility.* How can one be so useful in Europe, where the theatre in every department of science is more crowded with actors than with spectators, (if I may use the expression) as in the United States, where the mind of a great and rising nation is to be formed and enlightened in the more difficult departments of learning? But to answer your interrogatories *seriatim*, I will first observe that I am armed with complete and full powers to make the contract final and obligatory at once, by a power of attorney, which you shall see.

*Duties.* Your office would be to teach the mathematical sciences by lessons, or lectures, whichever way you thought best, by a lecture on alternate days of an hour or hour and a half. And you will have nearly an absolute power as to the method of instruction. The only interference being by way of public examination, and the only thing required will be to find that the students make good progress.

*Direction.* The University of Virginia, by the statute of incorporation, (which I will show you) is under the management of seven visitors chosen by the Governor and Council of the State. The professors can be removed only by the concurring vote of  $\frac{2}{3}$  of the whole number, *i. e.*, of 5 out of 7. These visitors are the most distinguished men, not of Virginia only, but of America, Mr. Jefferson, Mr. Madison, &c.

*Time.* Your time would be entirely at your own disposal, except that it would be expected you should derive no emolument from any other office, the duties of which were to be discharged by yourself personally.

*Existing state of the University.* The whole is now complete, ready for the reception of professors and of students. The houses for the professors are most beautiful; the great building for lectures, &c., is magnificent—being on the plan of the Pantheon in Rome.

*Laws.* The code of laws was not finished when I left Virginia; indeed, I believe it was purposely deferred, that my observations and those of the several professors might assist in the compilation. You may be assured they will be most liberal toward the professors.

*Probable number of students.* Mr. Jefferson told me he had inquiries almost every post from various parts of the United States, to know when they would open their doors. He thought the first year there would certainly be 500 pupils. Say that of these only 200 enter your course, and I should think nearly the whole would, and setting them down at 30 dolls. each, as the medium price, you would then receive from the students \$6,000, from the university, \$1,500 = to \$7,500, or to £1,689 sterling. But if you received only £1,200 or £1,000, you would soon amass wealth enough to do as you pleased, for your expenses will not exceed £300 a year after the first year. You pay no rent for your house.

The University visitors are very desirous to open in February next. To assist you out, I shall be quite at liberty to pay you in advance enough to bear your expenses to Charlottesville, and your salary will do the business after your arrival. The passage is 30 guineas to Richmond, and it will not cost you 5 to reach Charlottesville, with all your *impedimenta*.

1. Now to another point. I wish to engage a first-rate scholar to teach the Latin and Greek languages profoundly—if he understand Hebrew, all the better.

2. A person capable of teaching anatomy and physiology thoroughly, with the history of the various theories of medicine, from Hippocrates down.



3. A person capable of demonstrating the modern system of physics, including astronomy.

4. A person capable of teaching natural history, including botany, zöology, mineralogy, chemistry, and geology.

You may probably be able to assist me in procuring fit persons for some of these departments, and you would do me a great favor. Could men of real learning and congenial habits be selected, it would make it one of the most pleasant situations that exist.

I should not omit to mention that Charlottesville is 80 miles above Richmond, the metropolis of the State, on navigable water, and already connected by the James River with Richmond.

Yours with great respect and consideration, &c.,

F. W. GILMER.

Five years will make you a citizen of the U. S., with a compliance with certain forms, about which I will direct you. Birth will make your posterity so—I wish them in anticipation, as I wish you most sincerely, a career of utility and of glory in our flourishing country.<sup>1</sup>

The next letter we have is one of August 1st, from Profes-

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<sup>1</sup> This letter is taken from a first copy made by Mr. Gilmer. Through the kindness of Mr. Key's eldest daughter I was enabled to compare it with the final letter that was sent. The formal variations were considerable; but as the matter was practically the same, the differences are not noted. I wrote to George Long, Esquire, of Lincoln's Inn, to discover whether his father had left any papers or memoranda that bore upon the present study; but that gentleman was unable to furnish me with any data. In his courtesy, however, he communicated with Mr. Key's daughter, who was considerate enough to make the copy alluded to, for which I desire publicly to return my thanks. She recollects having heard her father speak of Gilmer in very pleasant terms. It will interest American readers to know that the two friends, Key and Long, whose intimacy began at Cambridge and continued through university life of fully fifty years, left families which, through intermarriage and friendship, seem likely to perpetuate the same pleasant relationship.

sor (afterwards Sir John) Leslie to Gilmer, at the Gibbs Hotel. Mr. Jefferson had thought that the great scientist, now Playfair's successor in the chair of natural philosophy, would be inimical to his pet institution. I suppose this was due to some misunderstanding that must have arisen when Leslie was in Virginia (1788-9) teaching in the Randolph family. It will be seen later that Mr. Jefferson labored under a misapprehension.

QUEEN STREET, *Sunday Evening.*

*Dear Sir,*

I stated to you that it appeared to me that even the temporary superintendence of a person of name from Europe might contribute to give eclat and consistency to your infant university. On reflecting since on this matter, I feel not averse, under certain circumstances, to offer my own services. I am prompted to engage in such a scheme partly from a wish to revisit some old friends, and partly from an ardent desire to promote the interests of learning and liberality. I could consent to leave Edinburgh for half a year. I could sail from Liverpool by the middle of April, visit the colleges in the New England States, New York and Philadelphia, spend a month or six weeks at Charlottesville. I should then bestow my whole thoughts in digesting the best plans of education, &c., give all the preliminary lectures in Mathematics, Natural Philosophy, and Chemistry, and besides, go through a course comprising all my original views and discoveries in Meteorology, Heat, and Electricity. Having put the great machine in motion, I should then take my leave to visit other parts of the Continent. But I should continue to exercise a parental care over the fortunes of our University, and urge forward the business by my correspondence, &c. To make such a sacrifice as this, however, I should expect a donation of at least one thousand pounds, which would include all my expenses on the voyage, &c. If you should think well of this proposition, you may consult your constituents. Were it

acceded to, I should probably in the autumn visit both France and Germany, with the view of procuring aid and instruments to further our plans. But at all events, I trust you will not ment[ion] this c[onfi]dential communication w[hich] I send you on the spur of the moment. Whatever may be the decision, I shall at all times be ready to give you my sincere and impartial advice.

I ever am, Dear Sir,

Most truly yours,

JOHN LESLIE.

On the 7th of August, Gilmer wrote a letter to his friend, Chapman Johnson, a well-known lawyer in Richmond, and one of the Board of Visitors; but for some reason the letter was not sent. It touches on several interesting matters, and is therefore given here :

EDINBURGH, 7 *August*, 1825.

*Dear Johnson,*

I satisfied myself at the English Universities that it was idle to seek at either a professor in natural philosophy. They have no general lecturer on this important branch; but each college (where it is taught at all) has its own professor: none of them, I believe, equal to our old master, the bishop [Bishop Madison]. This department I found far more successfully cultivated in Scotland, and I looked to it or London as our only chance. Here I could learn of but one individual eminently qualified, and he being already engaged in a good business, I had no great hope of seducing him from Edinburgh. I have been a fortnight making inquiries and besetting him; he is to give a final answer this evening, [He did not for nearly a week] but I am impatient to be off to London, where as from a central point I can carry on two or three negotiations at once. If Buchanan (that is his name) accept my offer, I shall be well pleased. He is both practical and theoretical. He has written some learned articles in the

supplement to the *Encyclopedia Britannica*, and is a matter-of-fact man, and equally qualified both for natural philosophy, properly [speaking], and for chemistry. And I now know by the fullest inquiry that what I told you is true—chemistry must be attached to natural philosophy, and astronomy to mathematics. You will hardly in all Europe find a good naturalist deep in chemistry, while every natural philosopher is pretty well acquainted with chemistry; and few natural philosophers are deep in astronomy, while almost every mathematician is. So whether Buchanan and I agree or not, I have nearly given up the hope of uniting natural history and chemistry. [He then alludes to Leslie and Mr. Jefferson's fear that he would be hostile—accident had thrown them together, and they had become friends—Leslie having done more for him than anyone except Dr. Parr. He then cites Leslie's offer, and adds—] It seems to me, that as Leslie's name would give us immense renown, we should do a good deal to procure it. We might agree to give him so much and take the fees to ourselves, so as to get him there probably for less money than we will give another. The trustees should think of this, and if you come to any conclusion as to his offer, or as to getting him with us permanently, Mr. Jefferson may write to him, as if in a highly confidential manner. I know his letter will, at any rate, be well received, which Mr. J. does not believe.<sup>1</sup>

I think it a great pity your agent is so fettered by instructions. Your short vacation (6 weeks) has done immense mischief, and it cannot last a year. Think of 200 boys festering in one of those little rooms in August or July: the very idea is suffocating. You should have begun with three months, and gradually shortened it to two. If Buchanan and I disagree, it will be on this point only.

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<sup>1</sup> Whether Leslie's offer was considered, or whether he withdrew it, I do not know. Gilmer's subsequent success would have ended the negotiation at any rate, had it been started; but the fact that Leslie made such an offer is surprising.



It is time I should say something of the honor you designed me. Long as I have delayed it, I yet want the materials for a final judgment, but think it proper to say that considering the immense labors thrown on me, the very short vacation and my prospects at the bar, a salary of \$2,000 is the least I could accept. With that beginning in October to enable me to prepare my course in the winter, I believe I should accept it. But not knowing that you will grant it on these terms, I think it best to give you notice, that you may look elsewhere in time. If you would make me President or something, with the privilege of residing anywhere within 3 miles of the Rotunda, it would be a great inducement. But to put me down in one of those pavilions is to serve me as an apothecary would a lizard or beetle in a phial of whiskey, set in a window and corked tight. I could not for \$1,500 endure this, even if I had no labor.

I have one of the finest men I saw at Cambridge in my eye for mathematics. I find him well disposed to us. We are to go into details when I return to London.

We shall find that the difficulties of combination here alluded to were finally overcome, at least in the main. Of the correspondence between Gilmer and George Buchanan, only two short notes from the latter have been preserved, one of August 12th, the other of prior but uncertain date. From the second we learn that Buchanan wished a long vacation, that he might revisit Great Britain at least every other year; from that of August 12th we learn that he called upon Gilmer in Glasgow, but found him gone on an excursion. In this note the situation of professor of natural philosophy was politely declined. Buchanan (1790?–1852), we cannot doubt, had been recommended by Leslie, whose favorite pupil he was. He had already, at the time Gilmer's offer was made, won a considerable local reputation as a civil engineer, and had also delivered lectures (1822) in Edinburgh on mechanical philosophy. His scientific reports on various government

enterprises and his success as an engineer, gave him subsequently a wide reputation—which was increased, among special students, by several well executed scientific treatises.

I must now go backwards, to give a letter written to Peachy Gilmer on the 31st of July, which, though mainly personal, seems worthy of presentation :

EDINBURGH, 31st July, 1824.

*My dear Brother,*

I have now been five days in the Metropolis of Scotland, one of the most beautiful cities of Europe, both in its natural scenery and admirable buildings, . . . . . As I entered the town, and often since, I have had strange and melancholy reveries ; here fifty years ago, our father was at College, sporting with more than the usual gaiety of youth, here thirty-four years ago, our poor brother Walker caught his death like my ever beloved Harmer, by an assiduity, which there was no kind friend to temper—both their lives might have been saved, had those about them in their studies, possessed a spark of feeling or judgment—two lines in the poem which took the prize at Cambridge (which I heard recited) were equally applicable to H.

“In learning’s pure embrace he sank to rest  
Like a tired child, upon its mother’s breast.”<sup>1</sup>

But these reflections draw tears to my eyes for the millionth time, and each I resolve shall be the last, for they are vain.—

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<sup>1</sup> Winthrop Mackworth Praed (1802–1839) of Trinity gained the Chancellor’s medal in 1823 by his “Australasia,” and in 1824 by his “Athens.” In the latter poem the lines quoted occur. They commemorate the death of John Tweddel, a brilliant young Cantab, who died at Athens in 1799. It is sad to think that an early death cut off both the poet and his first American admirer from brilliant careers both in literature and in politics ; and it is interesting to reflect that this is the first quotation from Praed that found its way to America—the country which had the honor of putting forth the first collection of his poems.

they no more than "honor's voice" can "provoke the silent dust," or than "flattery soothe the dull, cold ear of death"—when a few more heart strings are cut, I shall seem to belong rather to the next world than to this, and without the saint like purity of either of our brothers I shall be glad to lay my head beside theirs—I write all this in no bitterness of heart nor in any desponding mood, the place, the occasion and addressing you from Edinburgh all conspire to elicit fruitless sighs.

My visit has so far been very pleasant, I told you what a delightful time I had at Cambridge. I have since spent two days with the celebrated Dr. Parr, the greatest scholar, now in existence. He is old, decrepid, and with the manners of a pedagogue, but withal, exceedingly agreeable. He is a decided and warm champion of our country, took great interest in my mission, and has already been of service in furnishing me a catalogue of books. He spoke right out and said several very flattering things to me, which it is not worth while to repeat even to you. He went with me to Guy's Cliff (one of the most romantic establishments in G. B.) and to Kenilworth, where we dined with a friend of his.

The people of Edinburgh are very hospitable and kind, but less like ourselves, than the Cambridge lads. Here every man seems engaged in letters or science. I breakfasted with the famous professor Leslie, and he was surrounded by his meteorological machines.

Mr. Jefferson imagined he would be hostile to us. I have turned him to good account, by having heard something (it was very little) of his discoveries. . . . Jeffrey is out of town, but I shall see him. Mr. Murray a distinguished advocate, connected with the great Lord Mansfield, has shown me many civilities and I this morning received a written invitation to visit Lord Forbes,<sup>1</sup> which I shall not have time to do.

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<sup>1</sup> Lord Forbes (1765–1843)—the seventeenth of the title and Premier Baron of Scotland—had been somewhat distinguished as a soldier in his early life. See a notice of him in the *Gentleman's Magazine* for 1843 (Part I).

He dined with us at Murray's yesterday, and is genteel and well disposed towards our country. I go from this place to London, and shall endeavour as soon as I can to draw matters to a close & return. I shall be able to turn the acquaintances I have made here to good account to our country. Even to procure a good library and apparatus is a great matter, for we then have at least the materials for working which we now want. They seem astonished to find I have been in G. B. only 6 or 7 weeks, and speak English quite as well as they, to say the least. I believe many of them on both sides the Tweed would give a good deal for my accent and articulation, which, I assure you, are nothing improved by this raw climate, which makes every one hoarse; they are generally less easy and fluent in conversation than we. . . . .

Gilmer did see Jeffrey—for we have a note from the latter making proposals for a trip to Inverary and telling Gilmer to meet him in Glasgow. Putting this fact with the statement made in Buchanan's note, we are warranted in believing that the pleasant excursion was made. Besides we have a statement in one of the numerous letters before us that Mrs. Jeffrey wrote to her father in New York that Gilmer was the most popular and attractive American that had ever been seen in Edinburgh. I mentioned many pages back that Jeffrey was one of Ogilvie's auditors in New York; he was there in pursuit of this very Mrs. Jeffrey—then a Miss Wilkes—related, as De Quincey somewhere shows, to the celebrated Wilkes.

Although Gilmer does not seem to have visited Lord Forbes that gentleman was kind enough to send him three letters of introduction to literary friends in Dublin—whither Gilmer proposed to go if he did not succeed in Great Britain. His lordship's hand is not the best and I shall not risk pronouncing who his distinguished friends were.

Among the many invitations received by Gilmer while in Edinburgh was one from a Mr. Horner whom I take to have



been Leonard Horner the brother and biographer of Francis Horner—the political economist and joint founder of the *Edinburgh Review*. If one only knew a few more facts quite a pretty picture might be drawn of a pleasant evening spent by this clever young stranger in the presence of one of the beauties of Great Britain. But I do not know whether Gilmer accepted the invitation or whether *Leonard Horner* gave it or whether Mr. Horner was then married. All that I do know is that whenever he got Miss Lloyd<sup>1</sup> to marry him, he got a beautiful woman.

I now give the next letter written to Mr. Jefferson, in which the professorship of law is finally declined.

EDINBURGH, *Aug. 13th*, 1884.

*Dear Sir.*

It is now more than a fortnight since I arrived at the Ancient Capitol of Scotland. The first four or five days were spent in making inquiries for persons fit for any of our purposes, but especially for anatomy, natural history, and natural Philosophy; for I had well satisfied myself in England that we could not except by chance, procure either of the latter there. In all Scotland, from all the men of letters or science at Edinburgh, I could hear of but two, fit for any department, at all likely to accept our proposals. These were Mr. Buchanan for natural philosophy, & Dr. Craigie<sup>2</sup> for anatomy &c. I

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<sup>1</sup> See Mrs. Gordon's "Christopher North," page 25. Leonard Horner (1785–1864) was a F. R. S. and a geologist of some note. He was prominent in promoting the scheme for a university in London, and in 1827 was made Warden of the new institution.

<sup>2</sup> David Craigie, M. D. (1793–1866) was a graduate of the University of Edinburgh and (1832) fellow of the Edinburgh College of Physicians. He had not a large practice, nor was he famous as a teacher, but his "Elements of General and Pathological Anatomy" (1828) is said to have shown great reading and to be still valuable. He was owner and editor of the *Edinburgh Medical and Surgical Journal*. His health was continuously failing for many years.

made to them both, and every where that I went, the most favourable representations I could with truth, of our University. They required time to consider of our offer.—and to day I have received the answers of both. They decline to accept it. You would be less astonished at this, if you knew what a change had taken place since you were in Europe. The professorships have become lucrative, beyond every thing. Even the Greek professor at Glasgow, Leslie tells me, receives 1500 guineas a year. Some of the lecturers here, receive above £4000 sterling. Besides this we have united branches which seem never to be combined in the same person in Europe. . . . . I have moreover well satisfied myself, that taking all the departments of natural history, we shall at Philadelphia, New York &c procure persons more fit for our purpose than any where in G. B. The same may be said of Anatomy &c. I shall however set out for London to morrow, and try what can be done there by corresponding with the places I have visited. A mathematician and professor of ancient Languages we should, if possible, find in Europe, for they I am sure will be better than our own. Even here the difficulty is greater than you can conceive. Proficiency in Latin & Greek are still the sure passports to preferment both in Church & State; nor is the supply of men of the first eminence, or such as we must have, at all in proportion to the demand. When I came I thought it the easiest place to fill; I assure you it is far the most difficult. This Dr. Parr told me, but I thought he exaggerated the obstacles. I now believe he has not. You apprehended Leslie would be at best indifferent to us. He has however taken more interest in our success, than any one I have seen and been of more service to me. [Here he mentions Leslie's offer.]

. . . . .  
I think it well to mention this, for the visitors may make something of it, and I believe if you were once to get him there, it would not be difficult to keep him.

It is time I should say something of the honor the visitors

have done me, though I have no more materials for deciding now, than when I left you. I make my decision, only to prevent delay in your looking elsewhere. I find it so doubtful, whether we can procure such persons as I should choose to be associated with; and thinking myself bound to make my election as early as possible, that I must say as the case now stands, I cannot accept the honor which has been conferred upon me, in a manner the most flattering, accompanied by a great mark of confidence in appointing me this most important mission. I shall discharge my undertaking to you and my duty to my country, perilous as it is, to satisfy my own conscience. I will, if it be possible in Europe, procure fit men; but I will rather return home, mortifying as it would be, without a single professor, than with mere impostors. As at present advised, I cannot say positively, that I may not be condemned to the humiliation of going back with Dr. Blaetterman only. All this is very discouraging to you, but I present to you the exact case, without any diplomacy to recommend myself or deceive you and my employers. Should they find fault with the address of their agent, they shall at least never condemn his honesty, or doubt his fidelity. My address (such as I possess) I shall reserve for my negotiations here.

This condition of affairs, requires all and much more than my fortitude—it mars all the pleasures of visiting Great Britain, tho' in my letters generally I preserve the appearance of good spirits and success, because I always look to the Legislature—I shall be happy if we can succeed and miserable to return without fulfilling all that you desired.

P. S. I assure you, Leslie will receive any communication from you as an honor, he is by no means hostile to Virginia. He speaks often of Col. R[andolph] with the utmost interest.

Having thus spent three pleasant weeks in Edinburgh, where he received attention from the distinguished men already named, as well as from Professor Jameson, the great

geologist, Gilmer seems to have gone straight to London, where we find him on the 21st of August beginning a correspondence destined to be of great service to the University. Mr. Key, with whom Gilmer seems to have been staying, had recommended as classical professor a young college mate of his own—Mr. George Long. This gentleman was a year younger than Key, having been born in 1800. He was a fellow of Trinity, and already favorably known. I present a synopsis of Gilmer's letter to him as a specimen of the offer which the agent was authorized to make. He states that his powers are absolute, and that any engagement made with him would be binding without further ratification. Long is to have (1) a commodious house, garden, &c., entirely to himself, free of rent, (2) a salary of \$1,500 and "tuition fees of from \$50 to \$25 from each pupil, according to the number of professors he attends." He can be removed only by the concurrent votes of five out of seven of the board of visitors. He is to be allowed to return to Cambridge in July, 1825, a concession necessary to his holding his fellowship. He is not to teach a grammar school, but advanced classes—Hebrew being included in his professorship, but with little chance of being required. The professors must be ready to sail by November. The letter concludes by explaining the site of the University, and is, as a whole, courteous and businesslike.<sup>1</sup> On the same day an almost exact counterpart of this letter was sent to the Rev. Henry Drury, assistant master of Harrow, who had been recommended by Dr. Parr, himself long connected with Harrow, as a fit person to advise in the matter of the classical professorship.

On the 24th of August, Gilmer wrote to Leslie an important letter of which I give the substance. Professor Jameson had advised that the object of the mission should be published in the leading newspapers. Gilmer thought that might do in

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<sup>1</sup> It is given in Dr. Adams' monograph on Thomas Jefferson, page 114.



Scotland, but, remembering Brougham's admonitions, did not feel certain that it would work well in England, and so he felt compelled to decline Professor Jameson's offer to write up the matter. Jameson had also recommended Dr. Knox of Edinburgh for the anatomical chair; and as Gilmer did not know the latter's address, he requests Jameson to sound him on the subject. Leslie seems to have seconded Brougham's recommendation of Ivory, but Gilmer has not been able to find him and thinks he will secure Key's services instead. The letter closes by making a suggestion to Leslie about a physical experiment the latter had shown him in Edinburgh.

On the same day this letter was written, Mr. Long in Liverpool was writing a reply to Gilmer's offer of the 21st instant. His manly letter is given at length:—

LIVERPOOL, *August 24.*

The subject of your letter renders an apology for writing to me quite unnecessary; I am pleased with the plain & open manner in which you express yourself and encouraged by this I shall freely state to you all my thoughts on the subject, and make such enquiries as the case seems to me to admit. The nature of the powers with which you are vested gives me full confidence in your proposals, and from Mr. Key's letter I am led to expect that all information you give me will bear the same marks as the communication I have already received. The peculiar circumstances of my situation induce me to throw off all reserve, and to trouble you with more words than otherwise would be necessary. About two years since I lost my remaining parent, a mother whose care and attention amply compensated for the loss of a father & no inconsiderable property in the West India Islands. By this unfortunate occurrence I have the guardianship of a younger brother, and two younger sisters thrown upon me—with numerous difficulties, which it is useless to mention because no body but myself can properly judge of them,—and with an income for their

support which is rapidly diminishing in value. I have for some time past been directing my attention to the study of the law with the hopes of improving my fortune, and the ambition, which I hope is a laudable one, of rising in my profession. In truth the latter is almost my only motive for entering into the profession, as I am well acquainted with the insupportable tedium & vexation of the practical part. But the obstacles in my way, tho I should consider them trifling if I were solely concerned for myself, become formidable when I reflect on the situation of my family. I wish then to know if that part of America would afford an asylum for a family that has been accustomed to live in a respectable manner, and an opportunity for laying out a little property to advantage.

From your account of that part of Virginia, and from what I have learned from books and other sources of information, I conclude that new comers are not liable to be carried off by any dangerous epidemic disorder.

The salary attached to the professorship seems adequate . . . but I wish to know what proportion it bears to the expense of living—many of the common articles of food I can imagine to be as cheap as in England—but other articles such as wearing apparel, furniture & I should conceive to be dearer than they are here. Your information on this subject will supply the defects in mine.

Is the University placed on such a footing as to ensure a permanent and durable existence, or is the scheme so far an experiment that there is a possibility of its failing?

Is there any probability of the first Professor being enabled to double the 1500 dollars, when the University is fairly set at work, by his tuition fees? You will perhaps be surprised at this question; I am not at all mercenary or addicted to the love of money—I have reasons for asking which I could better explain in a personal interview.

Is there in the county of Albemarle, or town of Charlottesville, tolerably agreeable society, such as would in some degree compensate for almost the only comfort an Englishman would hesitate [to] leave behind him?

What vacations would the Professor have—and at what seasons of the year—of what nature, with respect to the time to be left for literary pursuits, and the studies connected with his profession, by which as much might be effected as by the employment more immediately attached to the situation?

With respect to my coming to England in 1825, that would be absolutely necessary. Unless I take the degree of Master of Arts next July, I forfeit my Fellowship which is at present the only means of subsistence I have, except the occupation in which I am at present engaged of taking private pupils. Should the expectation that I am induced to form be realized, my Fellowship of course would be a small consideration: but as I just observed the settlement of my affairs here would render my presence necessary in 1825.

The Professors, you tell me, can only be removed by the concurring voice of 5 out of the 7 directors: I presume that inability to perform the duties of the office, or misconduct would be the only points on which such a removal would be attempted.

I have no attachment to England as a country: it is a delightful place for a man of rank and property to live in, but I was not born in that enviable station . . . If comfortably settled therefore in America I should never wish to leave it.

I wish to know what may be the expenses of the voyage & if they are to be defrayed by the persons engaged—also what kind of an outfit would be necessary, I mean merely for a person's own convenience.

Mr. Key knows nothing of me but from college acquaintance: he therefore could not know that he was directing you to a person who would raise so many difficulties, and make so many enquiries some of which you may judge impertinent. For the last 6 years I have struggled with pecuniary difficulties, & I am not yet quite free from them: I have thus learned at an early age to calculate expenses, & consider probabilities: when I know the whole of a case, I can come to a determination & abide by it.

If you will favor me with an answer as soon as you find it convenient, I shall consider it a great favor—I must again apologize for the freedom with which I have expressed myself: when I have received your letter, I will inform you of my determination.

I will thank you to inform Mr. Key that he will receive a letter from me by the next post after that which brings yours.

I remain with the greatest respect

Yours G. LONG.

Please to direct "George Long, No. 1 King St., Soho, Liverpool.

In the meantime Gilmer, on the advice of Dr. Parr, had written on the subject of the classical professorship to Samuel Butler (1774–1839), the well-known head master of Shrewsbury school. Dr. Butler was one of the leading English educators, and a great friend of Dr. Parr's, whose funeral sermon he preached. After a brilliant career at Cambridge, where he was elected Craven scholar over Coleridge, he had taken charge of the Shrewsbury school in 1798, and made it one of the best in the country. He was a noted classical scholar, and was at this very time finishing his edition of Aeschylus. He was subsequently made Bishop of Lichfield and Coventry.

Dr. Butler answered Gilmer on the 26th of August, and recommended in high terms a clergyman whose name he did not give. He also assured Gilmer that he would be glad to show him the school<sup>1</sup> and give him further information, adding that although he could not offer him a bed, he should be happy to see him at breakfast, dinner, and supper.

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<sup>1</sup> A glance through the Rev. J. Pycroft's "Oxford Memories" will show how high the Shrewsbury boys stood in the classics. In athletics they were backward; for it was to them that Eton sent the famous message when challenged for a cricket (or football) match: "Harrow we know, and Winchester we know, but who are ye?"



On the next day (the 27th) Gilmer wrote two letters, one to Mr. Long, the other to Mr. Jefferson. That to Long answered his queries *seriatim*, and, as its writer observed, dealt with him not as a merchant, but rather as a scholar. He was to teach Latin, Greek, Hebrew, Rhetoric, and Belles-Lettres ; but little stress was to be laid on the three last.

The letter to Jefferson runs as follows :

LONDON, 27th Aug., 1824.

Dear Sir,

My last letter from Edinburgh gave so gloomy an account of our prospects, that I hasten to relieve the picture. When I saw needy young men living miserably up 10 or 12 stories in the wretched climate of Edinburgh, reluctant to join us, I did not know where we could expect to raise recruits. While at Cambridge I became acquainted in Trinity College with an intelligent and fine young man, distinguished even at Cambridge for his mathematical genius and attainments, and M. A. of that University. He is the son of an eminent physician of London, and I hardly hoped we should induce him to go with us. I have, however, done so, and am delighted to find him a great enthusiast for the United States, and exactly fitted to our purposes in every respect. Securing him is a great matter, for he has a high character with the young men who were with him at Cambridge, and he will assist in procuring others. Already he has suggested the most fit person for the classics, and I am enquiring of others about him. The departments of anatomy, natural history and natural philosophy will then only remain. I have had more persons recommended for anatomy than for any other place, but immediately they find, they will not be allowed to practice medicine, &c., abroad, they decline proceeding further. That I fear will prove an insurmountable obstacle to us in this department. In the other two, I shall have great difficulties, and far from being harassed by applications, I cannot hear of any one at all likely to answer our purpose.

With a good classic, an able master of experimental science, and Key for our mathematician, we shall be strong whatever the rest may be.

The books and apparatus now occupy me very much—at the same time, I am corresponding with all parts of the kingdom, about professors. On returning to London, I received two letters from my venerable friend Dr. Parr, and another from his grand-son (who will be his executor) proposing to sell us the Doctor's Library entire at his death. It is a rich and rare and most valuable collection of the classics. But I wrote to them that the amount would be greater than I could apply to this single department. I promised however to suggest it to the Visitors, and if they please they can enter into correspondence on the subject. . . . . It would give some eclat perhaps to our Institution to have the Doctor's Library. I am not without hope of opening the campaign in February with some splendors. I know the importance of complete success with the next legislature and shall consider that in every thing I do.

I have been seeking Ivory all over London, but such is the state of science among alderman and "freemen," that no one can tell me where he is or ever even heard of him, and in Edinburgh, I found a splendid monument to Lord Melville and none to Napier or Burns. In Westminster Abbey, there is none to Bacon or Blake, but a great many to state and ecclesiastical impostors.

I shall write more at length as soon as I have done more. I wrote this only to allay your apprehensions excited by my last.

I have seen Major Cartwright, who is old and infirm. Dugald Stewart has lost the musick of his eloquent tongue by paralysis; he lives near Linlithgow about 20 miles from Edinburgh, is averse to company, and I therefore enclosed your letter with a card, expressing my regret that the state of his health should deprive me of the honor of his acquaintance.

Dr. Parr was delighted with your letter and will no doubt give me one for you, &c.

The visit to Major Cartwright brought Gilmer an invitation to dinner which bears the date of August 30th. Some description of this remarkable character might not be out of place, as the name of his brother, the inventor, is much more familiar to the majority of readers than his own. But space is wanting, and after all he intended far more good than he accomplished. Nevertheless as naval officer, losing the chance of promotion by his sympathy with America, as an agitator for the reform of parliament, as a colleague of Clarkson's, as a distinguished agriculturist, and as a sympathizer with the Spanish patriots, he deserves to be remembered, and was, as Mr. Jefferson said, a most worthy character for Gilmer to meet. Although the veteran (1740–1824) was within a month of his death, he busied himself greatly in behalf of Gilmer's mission. He got Mr. Harris, the former secretary to the Royal Institution, to make out a list of such editions as should be chosen for the University library, and he wrote to Bentham for a catalogue of the latter's works and bespoke his interest in Gilmer. Whether the philosopher knew that the young American had four years ago *confuted* him, is a matter of uncertainty—certain it is, however, that the desired catalogue was forthcoming. The Major also sent Gilmer a copy of his "English Constitution Produced and Illustrated," which, if it be as dry, as it is represented to be, I hope the young man did not feel bound to read.

In the meantime Gilmer had been introduced to a person destined to be of the greatest assistance to him. This was no other than Dr. George Birkbeck (1776–1841), the celebrated founder of the Glasgow Mechanics' Institute, said to have been the first of its kind in the world. Dr. Birkbeck's interest in popular education began in 1800, when he delivered a course of lectures to workingmen in Glasgow. He had left Glasgow for London in 1804, and had

practised medicine for many years ; but he had taken up the cause of education again, and was in this very year (1824) elected the first president of the London Mechanics' Institute, afterwards called in his honor the Birkbeck Institute. He was one of the founders of the University of London,—a fact which we shall have occasion to remember.

Dr. Birkbeck's first letter to Gilmer was dated the 29th of August, and addressed to him at 3, Warwick St., Charing Cross. In it attention was drawn to a gentleman destined to form the third member of the new faculty—Dr. Robley Dunglison, a prominent physician of Scotch extraction, residing in London. Dr. Dunglison, then about 26 years of age, was already favorably known as a medical writer, a reputation which, it is almost needless to say, was widely extended after he settled in this country. Gilmer was not long in following up Dr. Birkbeck's suggestion ; for on September 5th Dr. Dunglison finally accepted the anatomical professorship.

The first of September brought a note from Major Cartwright, together with four of his political tracts which, the writer declared, were with no small satisfaction put into the hands of a gentleman then occupied in collecting materials for perpetuating and adorning Republican Freedom. From the same note we see that Gilmer was to dine with him on the morrow. I may remark that Mr. Jefferson's letter to Cartwright was delivered by Gilmer, and is to be found in the second volume of Francis Dorothy Cartwright's life of her uncle (London, 1826, page 265). This letter is very interesting, and contains a complimentary notice of Gilmer.

On the 2nd of September the assistant master of Harrow (Rev. Henry Drury) answered Gilmer's letter of August 21st in a very formal note. He stated that he had been in the south of France, hence his delay, and that he had no one as yet to propose. He promised, however, to write to Dr. Parr, and hoped to answer more satisfactorily in a few days. He also mentioned that a similar application had been made to him some years ago concerning Boston—by Mr. Rufus King,



whose sons were his pupils. At that time he had had no one in view.

On the same day Mr. Long wrote from Liverpool, gratefully accepting Gilmer's offer. He had conversed with Adam Hodgson, a Liverpool merchant, who had written some letters on America, and his report of Charlottesville had settled the matter. Like all of Long's letters, this one was straightforward and manly.

Leslie also wrote on the 2nd of September regretting that no public announcement of the mission had been made and throwing a slight damper upon the whole scheme. He promised to speak to Dr. Knox<sup>1</sup> and seemed to favor him. Gilmer's suggestion as to the experiment was received with some little contempt, but the philosopher promised to do his best in helping him to get good instruments. He cited the case of the University of Christiania which, in so poor a country as Norway, "had £1000 at first furnished for instruments and £200 per annum since."

It has already been mentioned that on September 5th Dr. Dunglison definitely accepted. He desired to add chemistry to his chair of anatomy, but this request was afterwards refused. On the 6th Gilmer answered Long's letter of accept-

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<sup>1</sup>Dr. Robert Knox, then about 35 years old, was one of the best known of the Edinburgh physicians and owned one of the finest private anatomical collections in Europe. He did not come to America; but it would have been better for him if he had. Readers of the *Noctes Ambrosianæ* will surely remember the account of the famous Burke and Hare murder trial given in the number for March, 1829. Burke and Hare had committed several shocking murders in 1828, for the sole purpose of furnishing this Dr. Knox with subjects. It was claimed that the bodies were brought to Knox in such a fresh condition that he must have had suspicions of foul play. Burke was hanged, Hare having turned state's evidence. The excitement was immense, Knox's house was sacked by the mob and at Burke's execution thousands were heard crying: "Where are Knox and Hare?" Knox betook himself to London where he became an itinerant lecturer on ethnology. See Dr. McKenzie's edition of the *Noctes*, III, 239, &c. (New York, 1875).

ance and assured him that the University would not be sectarian—a thing which Long had feared. On the day before (the 5th) which was Sunday, Gilmer had been to Woolwich to see Peter Barlow, the celebrated professor at the Royal Military Academy; but not finding him returned at once to London.

On the 7th Barlow wrote regretting that he had missed his visit and answering a letter which Gilmer had left. This letter concerned one of the professorships which had been very difficult to fill—that of natural philosophy. Mr. Barlow was certainly the person to apply to. Born in 1776 of obscure parents, he had worked his way through many difficulties and was now among the foremost scientists of his day. His valuable tables, his essay on the strength of materials, and his magnetical discoveries had gained him great applause and considerable emoluments. He had just (1823) been elected a fellow of the Royal Society and was about to get the Copley medal (1825) for his magnetic discoveries. From 1827 he was destined to do valuable work as an optician and the Barlow lens has perpetuated his name. He died in 1862 having long since resigned his professorship. In the present letter Barlow proposed to write to a gentleman, whose name he withheld, and sound him on the subject of the required professorship. His nominee was stated to be the son of a late distinguished mathematical professor known both in England and America. This seems to point to Charles Bonnycastle, son of John Bonnycastle, the great mathematical professor at Woolwich, whose books were certainly used at that time in America, and who had been dead about three years. But Barlow's note of September 22nd shows that he had been corresponding with Mr. George Harvey, of Plymouth, about the same place. The only explanation is that Professor Barlow found that Mr. Bonnycastle was abroad on some business for the government, and as Gilmer was in a hurry, suggested Mr. Harvey as the next best choice. It will be seen that subsequently Mr. Bonnycastle obtained the place.

On the 9th, Dr. Butler wrote from Shrewsbury asking

many questions in behalf of his clerical friend. Some of these questions show considerable acquaintance with matters purely secular, but I have not time to dilate upon them. The letter, of course, did no good, as Long had already accepted.

Mr. Drury, of Harrow, also wrote on the same day about the same professorship—this time he did recommend somebody, viz., his brother<sup>1</sup>—in highly eulogistic terms. To the credit of the gentleman it must, however, be said that he did not attempt to conceal the fact that his brother was in pecuniary embarrassments and hence anxious to get away. This letter, too, must be added to the futile correspondence of which the volumes before me are full.

In the meantime Dr. Birkbeck had recommended for the chair of natural history, the hardest of all to fill, Dr. John Harwood, who was a lecturer before the Royal Institution and who was then giving a course of lectures before a scientific society in Manchester. This recommendation led to a long correspondence, the discussion of which I shall put off for a time, as it was mixed enough to involve Gilmer in some perplexity and his biographer in more.

On September 11th Mr. Barlow wrote that he was quite at a loss to know why he had not heard from his friend Mr. Bonnycastle (?). He proposed to wait on Gilmer in London, on the following Monday (13th), unless that gentleman could take a family dinner with him on the next day—Sunday—when they would have an opportunity of discussing matters

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<sup>1</sup> The Rev. Benjamin Heath Drury (namesake of a former distinguished head master), then at Eton, subsequently Vicar of Tugby, Lincolnshire. He died Feb. 20, 1835, and was a son of the Rev. Joseph Drury, long head master of Harrow and the friend of Lord Byron.

The Rev. Henry Joseph Thomas Drury (M.A., F.R.S., F.S.A.) had been a fellow of King's, Cambridge, was greatly interested in the Roxburghe Club, and possessed one of the finest libraries of the Greek classics in England. This library he was compelled to sell by auction at different times. He died March 5th, 1841, in his 63rd year. See *Gentleman's Magazine* for that year, also the chapter on Harrow in T. A. Trollope's "What I Remember."

more freely than by letter. Whether this invitation was accepted does not appear; but it would seem that some communication was had which led to the Harvey correspondence.

Between the eleventh and the eighteenth of September we find only one letter received by Gilmer. This was a pleasant one from Dugald Stewart, written from his retreat at Kinneil House, Linlithgowshire. It is such a perfect specimen of its kind that I must make room for it. Stewart, the reader will remember, had been paralyzed in 1822. His retreat in Linlithgowshire had been due to the generosity of a friend, and he was enjoying an ample pension, which John Wilson, who in 1820 had taken Dr. Brown's place in the Edinburgh University, and hence was Stewart's co-joint professor, was mean enough to criticize. The death of his son in 1809 had greatly prostrated him, and left him with an only daughter, in whose handwriting the following letter is:

KINNEIL HOUSE BY BO-NESS, N. B., *Sept. 14th, 1824.*

*Sir,*

It was with much regret I learnt from your note, that you had left Scotland without giving me an opportunity of meeting with you; and altho' I feel very grateful for the kind motive which deprived me of that pleasure, I cannot help expressing to yourself how very seriously I felt the disappointment. My indisposition would indeed have made my share of the conversation next to nothing, but I would have listened with great eagerness and interest to your information about America and in particular about Mr. Jefferson, who I am happy to find from his letter has not forgotten me after so long and so eventful an interval. I need not add that I should have enjoyed a real satisfaction in being personally known to a Gentleman of whom Mr. Jefferson speaks in such flattering terms, and to whose sole discernment has been committed the important trust of selecting the Professors for the new University.



I was truly sorry to learn that you had not succeeded in finding any recruits at Edinburgh for your new College. The field I should have thought, a very ample one, more especially in the medical department. I hope you have been more fortunate in the English Universities and should be extremely happy to hear from you on the subject. It is impossible for Mr. Jefferson himself to take a more anxious concern than I do, in everything connected with the prosperity of the United States, and particularly in every scheme which aims at improving the System of Education in that part of the world. May I beg to be informed about your own plans and when you propose to recross the Atlantic. Is there no chance of your taking your departure from a Scotch Port? If you should, I might still indulge the hope of seeing you here. At all events I shall write to Mr. Jefferson. I am sorry to think that my good wishes are all I have to offer for his infant establishment.

With much regard I am, dear sir,

Your most obedient servant,

DUGALD STEWART.

FRANCES WALKER GILMER, Esq.

The interval before mentioned was probably employed by Gilmer in visiting distinguished men, among whom was Campbell, whom he greatly admired, and certainly in writing the following letters—the first to Mr. Jefferson, the second to Dabney Carr :

LONDON, 15th Sept., 1824.

*My Dear Sir*

I have given you so much bad news, that I determined to delay writing a few days that I might communicate something more agreeable.

When I returned from Edinburgh, where my ill success is in part to be ascribed (I am well assured) to the ill will of some of our eastern Brethren, who had just before me been

in Scotland, I determined to remain at London as the most convenient point for correspondence. Here assisted by Key our mathematician (with whom I am more pleased the more I see of him) and several men of character and learning, I have been busily engaged since I last wrote. I have had the good fortune to enlist with us for the ancient languages a learned and highly respectable Cantab., but there have been two obstacles that have made me pause long before I conclude with him. He has no knowledge of Hebrew, which is to be taught at the University. This I easily reconciled to my duty, from the absolute necessity of the case. Oriental literature is very little esteemed in England, and we might seek a whole year and perhaps, not at last find a real Scholar in Latin and Greek who understands Hebrew. The other difficulty is more serious. Mr. Long, the person I mean, is an alumnus of Trinity College, Cambridge, he is entitled to his fellowship only on condition of his presenting himself at the meeting in the first week in July next. Failure to do this, no matter under what circumstances, will deprive him of about £300 per annum. That would be a great sacrifice. Still he seemed to me so decidedly superior to his competitors, who do not lie under the incapacity of being of clerical character, that I believe I shall not be faithful to my trust if I do not engage him with a reservation of the privilege of being at Cambridge for a week *only* in July; that is my present impression and very strongly fixed, tho' there was another most competent professor I could have, but for his being a clergyman. The Professor of Anatomy &c is a very intelligent and laborious gentleman, a Dr. Dunglison, now of London, and a writer of considerable eminence on various medical and anatomical subjects.

The Professors of natural philosophy and of natural history, still remain to be procured. . . . . Another week will inform me what can be done about the two vacant chairs.

The library and apparatus have given me great difficulty and trouble. I delayed as long as possible speaking for them, to have the assistance of the professors. But the time for

shipping them now presses so close, I have made out a catalogue of such as we must have, and have ordered the books and instruments to be shipped as soon as possible. The present aspect of affairs assures me, we shall be able to open the University on the 1st of February as you desired. The professors vary in age from about 26 to 43 or 4. Blaettermann is already married and by a very singular coincidence wholly unknown to me at the time, each of the others tho' now unmarried, will take out a young English wife,<sup>1</sup> tho' if they would take my advice they would prefer Virginians notwithstanding.

Dr. Parr has engaged to marry me in England without his fee which here is often considerable.

Having already declined the honor so flatteringly conferred upon me, I no longer feel at liberty to express any wish upon the subject. But really every thing promises to make a Professorship at the University one of the most pleasant things imaginable.

I have had no assistance (I wish I could say that were all) from a single American, now in England. Leslie in Scotland and Dr. Birkbeck (cousin to the Illinois Birkbeck) of London have taken most interest in the matter.

Mackintosh is too lazy for anything and Brougham's letters introduced me to eminent men, but they never took the right way, or to the right means for us, they talk of plate, furniture &c for the pavilions, while we want men for work.

I have had but a single letter from America—that gave me the very agreeable news, that you were all well in Albermanle, &c.

LONDON, 19th Sept., 1824.

*My dear friend,*

Many accidents have conspired to delay my embarkation for Virginia longer than I wished; at this season of the year no man in England is where he ought to be, except perhaps

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<sup>1</sup> It does not appear that either Long or Bonnycastle carried out wives.

those of the Fleet & of Newgate. Every little country school master, who never saw a town, is gone, as they say, to the country, that is to Scotland to shoot grouse, to Doncaster to see a race, or to Cheltenham to dose himself with that vile water. With all these difficulties and not only without assistance but with numerous enemies to one's success (as every Yankee in England is) I have done wonders. I have employed four Professors of the most respectable families, of real talent, learning &c &c a fellow of Trinity Col. Camb. and a M. A. of the same University. Then they are Gentlemen, and what should not be overlooked they all go to Virginia with the most favourable prepossessions towards our Country. If learning does not raise its drooping head it shall not be my fault. For myself I shall return to the bar with recruited health and redoubled vigour. I shall study and work & speak & do something at last that shall redound to the honor of my country. - My intercourse with professional and Literary men here has fired again all my boyish enthusiasm, and I pant to be back and at work. The library of the University and my intimacy with the professors, will now make even my summer holidays a period of study. Virginia must still be the great nation; she has genius enough, she wants only method in her application. I have seen several of the most eminent Scotch & English lawyers, and you may rely upon it, our first men have nothing to fear from a comparison with the best of them. The only decided advantage any of them have over us, is in Brougham. He has more science & accurate information (not letters mark you) than any one who ever figured at the English bar or in Parliament. In the mathematics, physical sciences, and political economy, few even of their exclusive professors are so learned; his labor is endless, his memory retentive, his faculties quick. I have not seen him at full stretch, but I think his mind is more like that of Calhoun, than any of our men. Mackintosh passes for very little here; he is lazy to excess, always vacillating and undecided, is allowed to have a great memory,



much curious learning &c but is without the promptness and tact necessary to business; then no one can rely on his opinions, principles or exertions. He is either not present or takes exactly the opposite course from what every one supposes he will. His declamatory way of talking about the "extraordinary eccentricities of the human mind" &c seems after such endless repetitions, monotonous & cold, while his manner is nearly as bad as any manner can be—swaggering vociferations and ear-splitting violence from beginning to end.<sup>1</sup>

The University will open in February and I shall be with you in time to give you a greeting at the Court of Appeals.

. . . . .

Another way in which Gilmer employed his time was in examining the library at Lambeth. Having wished to have a MS. relating to the life of John Smith copied, he entered into correspondence with one of the librarians and was successful in his object. This copy ought to be in the library of the University of Virginia, but I can learn nothing of it.<sup>2</sup>

On the 19th a sad little note was received from Miss Frances Dorothy Cartwright whom Gilmer had met at her uncle's house. Major Cartwright, who had now only four days to live, had directed that a package of his writings should be made up, and carried to Mr. Jefferson by Gilmer. In sending this his niece took occasion to write a loving and pathetic note about her uncle's condition and to express herself as glad that Gilmer would be able to speak of him as he deserved, in a country he had always loved. The note is touching and bespoke the true feminine heart which had burst forth into song over the woes of the Spaniards. For the lady was not only a devoted niece and faithful biographer but a poetess,

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<sup>1</sup> Compare with his friend Ticknor's impression (Ticknor's Life, &c., 1, 289).

<sup>2</sup> At the end of George Long's biographical sketch of Marcus Aurelius there is an eloquent tribute to Smith. It is highly probable that Gilmer introduced the great Captain to Long's notice.

albeit her works have not given her fame. She was the daughter of the distinguished inventor and lived to a ripe old age—dying in 1863.

On the 20th of September Mr. George Harvey wrote from Plymouth, asking many questions about the University. On the 22nd Peter Barlow wrote a short and unimportant note about Mr. Harvey, and on the 25th that gentleman himself wrote from Plymouth declining, on family considerations, gratefully, but positively, the chair of natural philosophy.<sup>1</sup> In the meantime the correspondence with Harwood about the professorship of natural history had been going on vigorously.

On the 27th Mr. Rush wrote proposing a visit to the dock-yard at Portsmouth during the first week in October; and as Gilmer wrote to his brother Peachy from that port on October 4th, the visit was probably made.

Dr. Parr also wrote, on the same day, a characteristic letter, which is here inserted:

HATTON, 3rd Oct., 1824.

*Dear & much respected Mr. Gillmar,*

I have been very ill, but I hope to be better. I will give myself the sweet satisfaction of writing to you a few lines before you leave England. I rejoice to hear that you have fixed upon proper teachers and I beg at your leisure that you will inform me of your names, the schools where they have been educated & the persons who have recommended them. When I get more strength & have the aid of a scribe I shall

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<sup>1</sup> Among the obituary notices in the Gentleman's Magazine I came across one which seems to point to this gentleman. It was to the effect that on October 29th, 1834, George Harvey, Esq., one of the mathematical masters at Woolwich, committed suicide in Plymouth by hanging himself by a silk handkerchief from a hook in his cellar—"verdict, mental derangement." Mr. Harvey contributed studies to various philosophical magazines, and two of his contributions may be found in the 10th volume of the Proceedings of the Royal Society of Edinburgh.

write to you and to Mr. Jefferson, and I shall correspond with both of you unreservedly. Through an active life and [of] nearly seventy eight [years] I have experienced the precious advantages of steadiness & sincerity. This you would have seen clearly if you had known me more closely. Mr. Gilmar, there is now a safe & open path for mutual communication thro' the American Ambassador & you will prepare occasionally for forwarding our letters. To Mr. Jefferson present not only my good wishes but the tribute of my respect & my confidence. I shall write of him [what] Dr. Young said of Johnson's *Rasselas*—"It was a globe of sense." I use the same words with the same approbation of Mr. Jefferson's letter to me. I have corresponded with many scholars, many philosophers, & many eminent politicians upon many subjects, but never, and I repeat the word, never did I see a more wise letter than that with which I was honored by Mr. Jefferson. I shall preserve it as [here the letter is torn] I heartily wish you a good voyage and have the honour to subscribe myself,

Dear Sir, your faithful friend &

Respectful obedient servant,

SAMUEL PARR.

By a letter from Key received on September 27th, we learn that the contracts with the four professors already engaged were being signed. There were, of course, some hitches with all, but both sides were anxious to be fair, and the difficulties were soon removed. A copy of the covenant with Dr. Dungleison is before me, but I am not certain that it was not altered, for it was made before any signatures had been affixed. The first year's salary was fixed at \$1,500; for the next four years it might vary from \$1,000 to \$1,500, according to the amount realized by tuition fees; the other provisions need not be cited. From Key's letter we find that both Dr. Dungleison and himself had engaged passage from Liverpool on the 16th of October.

On the same day, September 27th, a short note from Dugald Stewart was received, with a letter for Mr. Jefferson, and wishes for Gilmer's pleasant voyage.

In the meantime Dr. John Harwood, although his own plans with regard to the University were undecided, had suggested Mr. Frederick Norton, of Bristol, as a proper person for the chair of natural philosophy; and Gilmer had written to him accordingly. On October 3rd, Mr. Norton wrote to Gilmer asking for further information. I have been unable to get any information as to Mr. Norton's antecedents.

About this time Mr. Gilmer received the following letter, which requires some comment :

10 SEYMOUR STREET WEST.

*My dear Sir*

I thought I could let you go back to America without troubling you with a letter for my brother. I could not well dwell at length on the painful subject of my boy's state but I have alluded to it. In case it should give pain to his affectionate heart too much on my account, you may tell him that habit & fortitude are beginning to reconcile me even to this most terrible blow that ever befell my existence. You can tell him how cheerful you saw me & I am habitually so—for I think it folly to grieve at fate.

He is to be removed [to] an asylum very soon. At present he is in so strange a state that it is painful to see company in my own House. This circumstance has debarred me from the pleasure of shewing you many attentions that were due to you as a mark of my sense of your kindness. I have been much gratified however by making your acquaintance & with best wishes for your safety & happiness remain,

Dear Sir,

Yours very truly,

T. CAMPBELL.



The son whose misfortune is alluded to was Thomas Telford, named after Campbell's friend, the distinguished engineer. The poet's grief was great, and besides his work upon "Theodoric," which was published in November of this year, he threw himself heart and soul into another piece of work, to drive away his cares. This was the agitation of a scheme for establishing a university in London. Some such project had been in his mind since his visit to Germany in 1820; but it was not brought prominently forward until January 31st, 1825, at a dinner given by Brougham.<sup>1</sup> The matter was then pressed warmly by Brougham, Joseph Hume, Dr. Birkbeck, and others, and was brought to a successful issue in 1827. Now, as Campbell had allowed the idea to rest for five years, I do not think it at all improbable that Gilmer's visit, connected as it was with a similar movement in a kindred country, had a great deal to do with giving a fresh impetus to the scheme. Then, too, Gilmer had been thrown into intimate relations with Brougham and Dr. Birkbeck, and probably with Leonard Horner, and had doubtless by his enthusiasm kindled afresh their own natural impulses toward educational work—and these three were prominent among the founders of the London University. Besides there is a striking parallel in the un-theological basis of both colleges. It is well known that this latter institution drew back two of the professors whom England had lent to America; but it is more than probable that the connection between the two universities began with Gilmer's visit.

But to return to our main theme. Only four professors have so far been secured—those of natural philosophy and of natural history remain. The latter professorship was not filled at all in England, and the correspondence about it will occupy us soon. The former was filled before Gilmer left

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<sup>1</sup>See the article on Campbell in the Dictionary of National Biography, and also Beattie's Life of Campbell.

England, by the selection of Mr. Charles Bonnycastle, who has been mentioned before. Mr. Bonnycastle was then in his 33rd year, and was engaged abroad on some government business, the nature of which I have not learned. No letters to or from him are preserved, although some were written; the whole matter seems to have been arranged between Gilmer and Peter Barlow, after the 25th of September, when Mr. Harvey definitely declined. Gilmer, however, seems to have had a conversation with Bonnycastle just before he left London. This hasty arrangement by proxy led to a slight misunderstanding, as will be seen in the next chapter. A short account of the Harwood correspondence will close our sketch of Mr. Gilmer's important mission.

On the 20th of September, Dr. John Harwood, then lecturing in Manchester, answered a letter which Gilmer had been advised to write by Dr. Birkbeck. In this answer he expatiates on the advantages such a new field as America would offer a natural historian, but regrets that an engagement to lecture before the Royal Institution will leave him undecided as to his plans until the following May. But he offers a suggestion that may obviate the difficulty. He has a brother now studying medicine in Edinburgh, who has been a fellow lecturer with him in natural history, and who is zealous in the cause. Why not let him keep the place warm? He can have copies of any lectures the Doctor himself would deliver; and if the latter decide to remain in England, no fitter person than the brother can be found to keep the chair, and in two countries two Harwoods can work their way to fame. Gilmer's answer to this really well-worded letter, has not been preserved; but from a letter written by Harwood on September 20th, I judge that it was not unfavorable. The Doctor talks of forming a nucleus for a museum at once, and promises to look out for a professor of natural philosophy. Then comes a long and manly letter from William Harwood, the brother, offering his services. He owns to no very extensive knowledge of mineralogy, but has a good

training in chemistry, and is especially fond of zöology. He asks sensible questions, and writes throughout in a modest tone.

In the meantime (September 26th) John Harwood wrote, mentioning Norton by residence but not by name, and giving valuable information with regard to the purchase of a museum. He also recommends his brother in warm terms. Gilmer wrote, complaining that Harwood was not explicit enough, although to my mind he very explicitly wished his brother to get the place, either permanently or temporarily. Then Dr. Harwood wrote a letter on September 30th, "respectfully observing" that *he* could not enter into *any foreign engagement* for the *present*, but that his brother was at liberty to made arrangements either permanent or temporary. On October 1st, Dr. Harwood wrote another letter, this time concerning Norton, who would like the place, and whom he recommended highly, observing, however, that he was by no means a man of the world. Then on October 24th the Doctor wrote to his friend, Birkbeck, and stated that William Harwood had undertaken, at Gilmer's request, a visit to the Isle of Wight, to see that gentleman on his way out. On his arrival there, Gilmer informed him that so much time had elapsed that he should prefer to leave the matter to the Board of Visitors, unless Harwood would go out at his own risk. Dr. Harwood himself went over to Liverpool, in hopes of seeing Gilmer, but saw only Mr. Long. We learn also that Mr. Norton went to the Isle of Wight to see Gilmer, but arrived four hours too late—a sad commentary on unworldliness. This letter was forwarded by Dr. Birkbeck to Gilmer, in Virginia. Next in series comes a letter dated and endorsed *November 16th*, which can only mean *September 16*, but which is unimportant. It may here be remarked, incidentally, that in forwarding Harwood's letter, Dr. Birkbeck spoke highly of Bonnycastle, and stated that had he had any idea that the young man was within Gilmer's reach, he would have been his first recommendation.

Now it is not well to offer opinions when one has read only one side of the case, and I know Mr. Gilmer to have been a fair, honorable man who succeeded admirably in his other negotiations, but I cannot help thinking that he did not act in this affair of the Harwoods with his accustomed caution. He should not have made the young man come to the Isle of Wight and then put him off with an excuse that could not hold. He had engaged Bonnycastle within a week and that too without seeing him but once; he had absolute powers, and if he did not like young Harwood on personal acquaintance he should, I think, have found some other way of dismissing him than such an excuse. Besides if he had not liked the young man he should not have even hinted at his going to the United States at his own risk. But, I repeat, it is not well to judge too hastily in such matters. Gilmer was probably in a hurry to get back and had possibly been wearied by the elder Harwood's importunities. If one can judge by a letter, however, William Harwood was not the man to be treated so summarily. The Harwood letters it should be observed do not breathe a suspicion of any questionable treatment. I alone am responsible for these criticisms and they are the only ones I have to make on Mr. Gilmer's management of a tedious and difficult commission.<sup>1</sup>

I have so far said nothing about his purchases for the library; and now I can only mention that he bought most of the books from Bohn, and was much assisted by his banker, Mr. Marx.<sup>2</sup>

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<sup>1</sup> John Harwood, Esq., M. D., F. R. S., &c., died at St. Leonards on the Sea, September 7th, 1854. I can find no obituary notice of him either in the Gentleman's Magazine or the Athenæum for this year.

A Wm. Harwood, M. D., was the author of a book on the "Curative influence of the Southern Coast of England," which was both praised and abused (G.'s M., 1828, Part 2, Supplement). I do not know whether this was our friend or not.

<sup>2</sup> Mr. Madison will hardly seem to some a fit person to apply to for a catalogue of theological books; but he did make out such a list for the University. See his writings, III, 450.



On the 5th day of October he sailed from Cowes in the packet *Crisis*, bound for New York.

Thus three quarters of a century after Bishop Berkeley had discouraged Dr. Johnson from trying to obtain English teachers for the new King's College in New York, Mr. Jefferson and Mr. Gilmer succeeded admirably in their trying and important task.<sup>1</sup>

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<sup>1</sup> Berkeley's Works (Fraser), IV, 322. Letter from Berkeley to Johnson, Aug. 23d, 1749.

## CHAPTER V.

### CONCLUSION.

Thirty-five days after sailing from Cowes the packet *Crisis* arrived in New York. How Gilmer fared on the voyage will be seen from an almost too realistic letter written to Judge Carr on the 14th of November. This letter will be given presently. In the meantime on the 12th and 13th of the same month two letters were sent to Mr. Jefferson. In the first of these a list of the five professors was given and it was stated that they would arrive in ten days from the date of the letter. As will be seen later the hopes thus raised in Mr. Jefferson's breast were to be cruelly deferred. Gilmer also states that he could not hear of a single man in England fit for the chair of Natural History. In the second letter Campbell is said to have been the best friend Virginia had among all the writers of Great Britain. The letter also suggests John Torrey of West Point as the best person in America for the chair of Natural History. It may be mentioned here that President Monroe had some months since suggested Torrey and Percival, the poet and geologist, for chairs in the new University. We also find that Gilmer had been compelled to promise all the professors a fixed salary of \$1,500 except Dr. Blaettermann, who, he thinks, should be placed on the same footing with the rest. I now give portions of the letter to Dabney Carr.

NEW YORK, Nov<sup>r</sup> 14, 1824.*Most dear Friend,*

Having concluded all my arrangements in England much to my satisfaction, I thought to return with triumph to the light & bosom of my friends. Fatal reverse of all my hopes! here am I chained like Prometheus, after 35 days of anguish at sea, such as man never endured. I hold sea sickness nothing, I laughed at it, as I went over—but to have added to it a raging & devouring fever aggravated by want of medicine, of food, of rest, of attendance, & the continued tossing of the “rude imperious surge,” form a combination of miseries not easily imagined, & never before, I believe, exhibited. I am reduced to a shadow, and disordered throughout my whole system. My liver chiefly it is thought. Among other symptoms, while I was in mid ocean, a horrible impostumation, such as I supposed only accompanied the plague, in the form of anthrax or carbuncle, appeared on my left side, low as I was. I neglected it till it was frightful—it required lancing—but not a man could I get to do it—some were sea sick—others indifferent, I called one who said he was a Doctor, & desired him to cut it open—we had no lancet, no scalpel, no knife that was fit, & finding him a timid booby, whose hand shook, I took with my own hand a pair of scissors I happened to have, and laid open my own flesh. . . . . We had no caustic, & I had to apply blue stone, which was nearly the same sort of dressing, as the burning pitch to the bare nerves of Ravallac—yet I am no assassin—all the way I repeated,

“Sweet are the uses of adversity, &c.”

I must turn this to some account—in this world I cannot, but I “lay the flattering unction to my soul” that he who suffers well never suffers in vain. Such is the martyrdom I have endured for the Old Dominion—she will never thank me for it—but I will love & cherish her as if she did. . . . .

For over a month the poor fellow was confined at New York, but he was not idle. Mr. Jefferson answered his letters on Nov. 21st, giving an account of the University buildings and of his endeavors to get the books and baggage of the professors through without duty. In a note of November 22nd he implores Gilmer not to desert them by refusing the professorship of law—this being the only thing he has to complain of in all his agent's conduct.

On the 29th of November John Torrey<sup>1</sup> wrote from West Point declining the professorship of natural history on the ground that he was well satisfied with his present position, but recommending Dr. John Patton Emmet, of New York, in these words: "His talents as chemist and scholar, and standing as a gentleman are of the first rank. I know him well and know none before him." This recommendation brought about an interview between Dr. Emmet and Mr. Gilmer, the result of which was the election of the former to the chair which had given so much trouble. Dr. Emmet was a son of the Irish patriot and distinguished lawyer, Thomas Addis Emmet. Both father and son contributed to Gilmer's comfort during his confinement, as did also John Randolph of Roanoke, whom Gilmer had seen in England and who passed through New York during the latter's sickness. Gilmer's relations with this eccentric man were always of the pleasantest kind—a circumstance somewhat remarkable.<sup>2</sup>

At this time the young man had fully determined not to accept the law professorship as there seemed too much likelihood that, if he did accept, his health would render the position a practical sinecure; for he would have to have an assistant

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<sup>1</sup>Torrey left West Point shortly after (1827) and became professor of botany and chemistry in the College of Physicians and Surgeons. He wrote many valuable works on botany and deserves to be remembered as having been the instructor of Asa Gray.

<sup>2</sup>Wm. Pope, the eccentric character before alluded to, once wrote Gilmer that John Randolph had declared him "the most intelligent and best informed man of his age in Virginia" (letter of Nov. 2nd, 1825).



and he knew that the Visitors would never give him up after his valuable services and the consequent injury to his constitution. He therefore endeavored to sound as to the situation that distinguished jurist, Chancellor Kent, who had accepted a position in Columbia College, where he was to deliver the lectures which subsequently formed the basis of his Commentaries. The politics of the Chancellor were an objection, but his reputation as a jurist would make him a desirable acquisition. The negotiation did not go far, however, and Gilmer had to content himself with proposing the name of Dr. Emmet to the Visitors, cordially endorsing all that Torrey had said about him.

In the meantime Messrs. Long and Blaettermann arrived at New York, and after calling upon Gilmer, hastened to Richmond, proceeding from the latter place to the University, where they found their pavilions in readiness. It was also ascertained that Key, Dungleison, and Bonnycastle would sail in the Competitor direct to Norfolk.

By the 22nd of December we find Gilmer in Norfolk, staying with his friend Tazewell. On the same day Mr. Jefferson wrote two letters to Cabell in Richmond, from the first of which I take this extract :

“Mr. Long, professor of ancient languages, is located in his apartments at the University. He drew, by lot, Pavilion No. V. He appears to be a most amiable man, of fine understanding, well qualified for his department, and acquiring esteem as fast as he becomes known. Indeed I have great hopes that the whole selection will fulfill our wishes.”

The second letter was of a more private nature and is given almost entire :

MONTICELLO, *Dec. 22, 1824.*

*Dear Sir,*—Let the contents of this letter be known to you and myself only. We want a professor of Ethics. Mr. Madison and myself think with predilection, of George Tucker, our member of Congress. You know him, however, better

than we do. Can we get a better? Will he serve? You know the emoluments, and that the tenure is in fact for life, the lodgings comfortable, the society select, &c. If you approve of him, you may venture to propose it to him, and ask him if he will accept. I say "you may venture," because three of us could then be counted on, and we should surely get one, if not more, or all, of the other four gentlemen.<sup>1</sup> . . .

Mr. Cabell did sound Mr. Tucker, and after some deliberations that gentleman consented to be a candidate for the chair of ethics, to which position he was elected by the Visitors in March, 1825. At the same time Dr. Emmet was elected to the chair of natural history, and only the chair of law remained unfilled. Of Mr. Tucker's acquirements much might be said were not my space nearly exhausted. He had already acquired a reputation as a good lawyer and a faithful congressman, and had published some essays of value and a novel. He subsequently did twenty years of excellent work in his professorship, and greatly increased his reputation as an author by his *Life of Jefferson* and his *History of the United States*.

But my reader must not imagine that the Evil Genius of Protection did not croak and flap its bat-like wings when five British subjects were imported to ruin the mind of the American youth; or, as the *Boston Gazette* put it, to disgust them with anecdotes of "My Lord This" and "His Grace That." No—the following choice specimens of the journalism of the day will dispel any such comfortable idea—they are taken from the *Richmond Enquirer* of December 11th, 1824:

#### "IMPORTATION OF PROFESSORS.

"[From the *Boston Courier*.]"

"The *Richmond Enquirer* informs the public, that Mr. Gilmer of that city who went to England in May to *procure profess-*

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<sup>1</sup> Jefferson-Cabell Correspondence, pages 323, 324.

ors for the University of Virginia has returned and that he has been very successful in obtaining Professors, who were to sail from London in the Trident, about the 16th of October. On this the editor of the *Connecticut Journal* very properly remarks:

“ ‘What American can read the above notice without indignation. Mr. Jefferson might as well have said that his *taverns* and *dormitories* should not be built with American bricks and have sent to Europe for them, as to import a group of Professors. We wish well to his College, but must think it a pity, that an agent should be dispatched to Europe for a suite of Professors. Mr. Gilmer could have fully discharged his mission, with half the trouble and expense, by a short trip to New England.’

“ [From the *Philadelphia Gazette*.]

“ ‘Or, we may be permitted to add, by a still shorter trip to Philadelphia. But because Pennsylvania does not produce Stump-Orators and Presidents, the Virginians conclude that it produces nothing else of value, forgetful that the first physicians, philosophers, historians, astronomers, and printers, known in American Annals have been citizens of our State. This sending of a Commission to Europe, to engage professors for a new University, is we think one of the greatest insults the American people have received.’

“ We excuse the wit of our Boston and Philadelphia Editors, wishing them next time a better subject on which to employ it. It is by no means our desire to disparage the wise men of the East or the philosophers of Philadelphia, past, present or to come. We have had the misfortune, it is true, of producing two or three Presidents, and some fair stump orators (not to speak of Patrick Henry, R. H. Lee, John Randolph, or Littleton Waller Tazewell), but we do not see the mighty sin we commit either against good morals or good manners in looking out for the best Professors we can obtain for our rising University—nay of sending to G. Britain for Professors of the languages, mathematics and physics, if from any cause whatever it was not easy to obtain them in N. England or Pennsylvania. S. Carolina employs Dr. Cooper, has she been censured for her judicious selection? But no man can as well explain the motives of this visit as Mr. Jefferson himself, who in the

late report to the Legislature of Virginia has anticipated and answered, in the most appropriate manner, every exception that has been taken to the North. . . .”<sup>1</sup>

I may remark that the case of Dr. Cooper does not at all apply, for he had been in this country nearly 30 years, and was not specially imported. In the same paper, however, I find an extract from the *New York American*, which represents a more liberal class of our population.

“We have heard with pleasure of the arrival of Messrs. Long and Blaettermann, the professors of ancient and modern languages in the University of Virginia. They are well known and highly esteemed in England. Their talents and acquirements will doubtless be highly advantageous to the cause of Public Instruction in the country. The other Professors of this Institution, Messrs. Key, Bonnycastle and Dungleison are daily expected.”

In the meantime the Competitor had not put in an appearance, and great was the consternation on all sides. The newspapers gave accounts of terrific gales on the coast of England at the very time Key and his friends were to sail. Gilmer and Cabell were busy writing to Mr. Jefferson trying to allay the old gentleman’s fear, but greatly alarmed themselves. Day after day passed and the date fixed upon for opening the University (February 1st) drew near. Lying stories were set in circulation and many predicted that the University would never succeed after all the delay. But on January 30th a gleam of hope came. Cabell had seen in a Norfolk paper that the Competitor was still in Plymouth on the 5th of December, and so had escaped the October gale. To his letter announcing this fact Jefferson made the following reply which is interesting enough to quote.

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<sup>1</sup> If the New England editors had known that two of the first professorships had been offered to Bowditch and Ticknor, their language would probably have been milder; and what are we to think of the application of Rufus King to Mr. Drury?



MONTICELLO, *February 3, 1825.*

*Dear Sir,*—Although our professors were on the 5th of December still in an English port, that they were safe raises me from the dead; for I was almost ready to give up the ship. That was eight weeks ago, and they may therefore be daily expected.

In most public seminaries, text books are prescribed to each of the several schools, as the *norma docendi* in that school; and this is generally done by authority of the trustees. I should not propose this generally in our University, because, I believe none of us are so much at the heights of science in the several branches as to undertake this, and therefore that it will be better left to the professors, until occasion of interference shall be given. But there is one branch in which we are the best judges, in which heresies may be taught, of so interesting a character to our own State, and to the United States, as to make it a duty in us to lay down the principles which shall be taught. It is that of government. Mr. Gilmer being withdrawn, we know not who his successor may be. He may be a Richmond lawyer, or one of that school of quondam federalism, now consolidation. It is our duty to guard against the dissemination of such principles among our youth, and the diffusion of that poison, by a previous prescription of the texts to be followed in their discourses. . . .<sup>1</sup>

These books were actually chosen by Jefferson and Madison as we learn from a letter of the latter's dated February 8th, 1825 (Writings, III, 481); but, although it would seem that the progressive statesman had receded from his own excellent doctrine that the present generation should not hamper posterity, and although a greater than the Andover Controversy would seem to be here in germ, when we read the list of texts prescribed our apprehensions are abated. They consisted of

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<sup>1</sup> Jefferson-Cabell Correspondence, page 339.

(1) The Declaration of Independence, (2) The Federalist, (3) The Virginia Resolutions of '98 against the Alien and Sedition Laws "which appeared to accord with the predominating sense of the people of the United States"; and (4) The Inaugural Speech and Farewell Address of President Washington "as conveying political lessons of peculiar value."

On the same day that this letter was written Cabell wrote that as Gilmer had three times declined the law chair, it might be offered advantageously to Chancellor Tucker of Winchester. He also proposed a very impracticable scheme which I was surprised at so sensible a man's making, viz., to attach to the professorship a small chancery district consisting of Albemarle and four contiguous counties.<sup>1</sup> Negotiations were accordingly opened with Tucker but in vain. He was destined, however, to fill the chair from 1840 to 1844.

In the meantime the long wished for "Competitor" arrived at Norfolk and on Thursday evening, February 10th, Key wrote the welcome intelligence to Gilmer, who lost no time in informing Mr. Jefferson. Key and his companions passed through Richmond and attracted the most favorable notice. The battle had been won, even the capital city of the enemy had been completely disarmed.

On the seventh day of March, 1825, the University of Virginia was formally opened with the five foreign professors and forty students. Professors Tucker and Emmet arrived shortly after, and students kept coming in until on September 30th they numbered 116. The first term closed on December 15th, 1825. The professorship of law had in the meantime, after having been refused by Mr. P. P. Barbour and Judge Carr, been offered to Judge Wm. A. C. Dade, of the general court. Judge Dade seems to have been a fine lawyer and a man of some classical attainments; but the situation did not charm him. Accordingly Mr. Jefferson fell back upon his first choice and wrote him an urgent letter. Gilmer's health now

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<sup>1</sup>Same, page 338.

seemed sufficiently restored to enable him to undertake the work, and as he felt that the strain of public life would not suit him in the future, he answered Mr. Jefferson's more than flattering appeal by accepting the position. The visitors, therefore, unanimously elected him and he looked forward to delivering his first lecture at the beginning of the second term. But fate decided it otherwise, his health again broke down and he realized that this time he was disabled forever.

Then the visitors turned to Wirt, who had been thought of long before, but whose high position under the government had seemed to preclude all chance of his acceptance. To make the offer more attractive, it was resolved to create a new office of "President of the University of Virginia" which should be held by Mr. Wirt, but, if he declined, should not go into effect. This was in April, 1826. Wirt preferred to settle in Baltimore and so the ill-fated chair was offered to John Taylor Lomax—a lawyer of some distinction, residing near Fredericksburg. Mr. Lomax accepted and Mr. Jefferson's agony was at last over. On the 21st of April he wrote to Cabell that Lomax had paid them a visit and charmed them all.<sup>1</sup>

It would seem at first thought that my work is now accomplished and that that agreeable word "finis" is all that remains to be written. But we have not yet taken leave of the man whose labor this study was written to commemorate; and a few words as to the fortunes of those whom he brought over, would not appear amiss.

And now briefly of the latter point.<sup>2</sup>

Mr. Key finding that the climate of Virginia did not agree

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<sup>1</sup> Jefferson-Cabell Correspondence, page 377.

<sup>2</sup> My chapters in Dr. Adams' work, before referred to, are a proper supplement to this study, and to them the reader is referred. Volumes III and IV of Madison's Writings are the best original source I know of for the period from 1826-36.

with him was compelled to resign in 1827 and to return to England. There his high abilities were recognized by a position in the newly established University of London, and we marvel at the versatility of the man when we find that the remainder of his long and useful life was devoted to philology. He died in 1875, and his recently published Latin dictionary is the latest monument to his labor.

On Mr. Key's resignation, Mr. Bonnycastle was transferred to the chair of mathematics. This gentleman at first had some trouble as to a bond which he was under to the British government, and which was forfeited by his coming to America. A slight misunderstanding arose between Gilmer and himself owing to this fact and to the hasty drawing up of the contract between them. But mutual explanations happily settled the matter. Mr. Bonnycastle held the chair of mathematics until his death in 1840, and was, I believe, the first in this country to introduce the use of the ratio method of the trigonometrical functions.

Mr. Long received a call to the London University in 1828, but he left a worthy representative behind him. In my chapter in Dr. Adams' work, I give a sketch of the work of Dr. Gessner Harrison, whom Long nominated as his successor. That sketch, taken mainly from an address by the Rev. John A. Broadus, cannot be repeated here. It is sufficient to say that Long kept Dr. Harrison posted on all the latest German discoveries in philology, and that the students of the University of Virginia were familiar with the labors of Bopp before that great man was fully recognized in Germany itself. Of Mr. Long's subsequent labors for English education, I surely need not speak.

With respect to Dr. Blaettermann, I have been singularly unfortunate in collecting information. The few notices I have seen of him, speak highly of his attainments, but are not so pleasant in other respects. Gilmer seems to have seen what he calls a "puff" about him in one of the English papers,



and Dr. Gessner Harrison wrote in a kindly way of him in Duyckinck's *Cyclopaedia*.<sup>1</sup>

Dr. Robley Dunglison's name is so well known in this country that I need only say that he remained eight years at the University, and laid the foundation of what has proved to be a remarkably successful medical school. Mr. Jefferson, in his last illness, trusted entirely to his skill. His work in medical literature is known even to general readers. The subsequent careers of the native professors are foreign to my purpose, and it only remains for us to take our leave of the man we have learnt to know so well, Francis Walker Gilmer.

The tale is soon told; and being sad, this is surely best. After returning from New York, he was thrown back by the carelessness of a servant, who left a window open by his bed all night. As he was naturally delicate, his health was rapidly undermined. He could attend to little business, and left Richmond for Albemarle, from whence he went to one of the Virginia Springs. The little business he could attend to was of a painful nature, being connected with the ruined fortunes of his old friend, ex-governor Thomas Mann Randolph. The trip to the Springs buoyed him up, and he accepted the law professorship, as we have seen. But his disorders becoming worse, he was compelled to resign, and after a lingering illness of many weeks, he died at the residence of one of his relatives in Albemarle, on the 25th of February, 1826. One of his last acts was to leave a sum of money for the purchase of a communion service for the Episcopal Church in Charlottesville. He passed away in the arms of his brother Peachy, who has recorded in the volume before me that "he died in the faith of Jesus Christ." Upon the last letter which he received from his dear friend, Wm. Wirt, Gilmer wrote these few lines in pencil—the last writing he ever did: "Dear & beloved Mr. W.—Nothing but a last

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<sup>1</sup> Dr. Adams cites an article in the *Southern Literary Messenger* for January, 1842, which throws light on the characters of the early professors.

hope could have induced me to take such a liberty with you.<sup>1</sup> I have scarcely any hope of recovering & was but a day or two ago leaving you my last souvenir. I have not written to you because I love & admire you & am too low to use my own hand with convenience. Farewell to you & to all a family I have esteemed so well."

I promised to give a detailed account of Mr. Gilmer's literary work, but I now find that from want of space I cannot keep that promise. Perhaps it is as well that I should not; the world has forgotten what he wrote—I would fain hope that it will not forget what he did. There are MS. essays extant on "The causes of the ascent of vapour" and "Certain phenomena of vision," which it will be best to leave undisturbed, although they certainly show an original and inquiring mind. In the *Analectic Magazine* for July, 1818, will be found an interesting account of a visit paid to the Cherokees in Tennessee, probably in company with Mr. Corrèa, but the modern reader would be apt to think that the article dealt more with the Greeks and Romans than was necessary. The essay on the Natural Bridge, which was translated by Picquet, appeared, I believe, in the XVth volume of the same magazine. This I have not seen. In January, 1828, Fielding Lucas, Jun., of Baltimore, issued a small volume of "Sketches, Essays and Translations, by the late Francis Walker Gilmer, of Virginia," Mr. Wirt contributing a preface. This contained the revised "Sketches of American Orators," by far, it seems to me, his best performance, and containing some good criticism, "A vindication of the laws limiting the rate of interest on loans," an answer to Bentham, which, though it shows a great deal of legal learning, inclines too much to reasoning by analogy, and hardly settles the matter; and certain translations from the French economists lent him by Du Pont de Nemours. These, with the volume of

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<sup>1</sup> That is—using Wirt's own letter for his reply.

reports previously mentioned, constitute all of Gilmer's writings with which I am acquainted.<sup>1</sup>

His learning was certainly curious and enormous. He seems to have been a fine lawyer, perhaps the most learned of his day in Virginia; it can hardly be said that he was a philosophic jurist. He was also a good classical scholar and botanist—something of a philologist and physical experimenter—and personally one of the most agreeable of companions. There are many things in these letters which show a delicate wit and some of the turns of his mind are as original as they are entertaining. This may serve as a sample. Speaking of Wirt's success he says that he has heard that Wirt created as much astonishment in Washington as the Duke of Buckingham did in Madrid, "there having been no such comet in that hemisphere."<sup>2</sup>

How Mr. Gilmer was regarded by his contemporaries may be seen from the following letter:

WASHINGTON, Dec. 27, 1827.

*My dear Sir,*

I am extremely sensible to your kind attention & highly obliged by it. Everything connected with my late friend, your dear brother, is dear to me. I am now probably as near my journey's end as he was on his return from that ill fated voyage to England, from which I date the disease that so

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<sup>1</sup> I have seen it stated that he wrote some of the numbers of the "Old Bachelor," and several articles in the Virginia Evangelical and Literary Magazine, of which his friend, Dr. Rice, was editor. Both of these statements are probably true; but no mention is made of the matter in the Gilmer letters; nor is he stated to have been a contributor in the obituary notice of him in the ninth volume of the aforesaid magazine.

<sup>2</sup> I also find a characteristic sentence *à propos* of the strained relations between Wirt and Pinckney (relations more strained than Mr. Kennedy's tender heart would allow him to tell us). "You may never again have a chance of shivering his spear, which is not of mountain ash like that of Achilles, but, as Randolph said of his own, rather of the tobacco stick order, though pointed up like a small sword."

cruelly robbed us of him. Whether we shall be permitted to recognize our friends in a future world is beyond our ken—but the belief is so consonant with the goodness of our Creator & so consolatory to the heart of man that I would fain indulge in it.

Accept, my dear Sir, my best wishes and respects—

Your obliged

To

J. R. of ROANOKE.

PEACHY R. GILMER ESQ.

Both Mr. Randolph and Mr. Wirt were applied to for an epitaph; but neither felt equal to the task. The letters from which the foregoing was taken and which have been the basis of this study were collected by Mr. Peachy Gilmer in 1833 and bound in two large volumes for the use of his descendants. Mr. Wirt was very loth to part with Gilmer's letter to him, reserving at the last the letter written from Shakespeare's house and the leaf of Kenilworth ivy which accompanied it.

Francis Walker Gilmer, Virginia's benefactor, lies buried at his old family seat, Pen Park, in Albemarle County. Over his remains is a plain stone recording the dates of his birth and death and preserving the following epitaph, written by himself, and almost as sad as Swift's—

"Pray, stranger, allow one who never had peace while he lived,  
The sad Immunities of the Grave,  
*Silence and Repose.*"

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#### ERRATUM.

For "*gigomaniac*" on page 9 read *gig-maniac*. The quotation marks are dropped because the writer is doubtful whether Carlyle ever used the word—"gigmanity," which occurs in the essay on Boswell's Life, probably occasioned the misapprehension. But reviewing his work, after the lapse of nearly a year, the writer finds himself wondering how Carlyle and so many extraneous subjects got mixed up with what he intended to make the simple record of a good man's life.





## APPENDIX.

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It seems well to preserve here three of the letters which Gilmer received from George Ticknor. In a few respects they appear to supplement those, relating to the same period, which have already delighted the world in that charming book—"The Life and Letters of George Ticknor." Good letters are too rare to be carelessly put aside, and I feel convinced that my readers will thank me for acting upon this conviction and presenting these.

### I.

GÖTTINGEN KING<sup>m</sup> OF HANOVER.

*May 31st, 1816.*

I am rejoiced to find my Dear Gilmer by the letter you sent by Mr. Terrell<sup>1</sup> that you have not forgotten me, though you have not heard from me. That this has been the case, however is no fault of mine. Immediately after receiving your letter of last May, I wrote to America to know where I should address to you, and since then I have made the same inquiry of Mr. Jefferson and in Paris but could learn nothing of you, until day before yesterday, when your very welcome letter came to tell me all I hoped to hear except that you had renounced your intention of coming to Europe. In this respect you have changed your plans; and as you intend to be a lawyer, I rather think you have done wisely. I too

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<sup>1</sup>The young Virginian previously referred to.

have changed my plans, I have renounced the law altogether, and determined to prolong my stay in Europe, that I may do something towards making myself a scholar, and perhaps you will smile, when I add that my determining motive to this decision, of which I have long thought, was the admirable means and facilities and inducements to study offered by a German University. But however you may smile on the other side of the Atlantic, you would if you were on this, do just as I have done. My inclination is entirely & exclusively to literature—the only question with me, therefore, was, where I could best fit myself to pursue *haud passibus aequis* its future progress & improvement. In England I found that the vigorous spirit of youth was already fled though to be sure in its place I found a green and honourable old age—in France—where literature, its progress & success was always much more intimately connected with the court than it ever was in any other age or country if Rome under Augustus be excepted,—in France it has long been the sport of political revolutions & seems at last to be buried amidst the ruins of national independence—and in the S(outh) of Europe, in Portugal, Spain, and Italy centuries have passed over its grave.—In Germany, however, where the spirit of letters first began to be felt a little more than half a century ago, all is still new & young, and the workings of this untried spirit starting forth in fresh strength, & with all the advantages which the labour and experience of other nations can give it are truly astonishing. In America, indeed, we have but little of these things, for our knowledge of all Europe is either derived from the French, whose totally different manners, & language & character prevents them from even conceiving those of Germany, or from England, whose ancient prejudices against every thing continental as yet prevent them from receiving as it deserves a kindred literature. Still, however, the English scholars have found out that the Germans are far before them in the knowledge of antiquity, so that if you look into an English Treatise on Bibliography you will find

nine tenths of the best editions of the classics to be German ; —and Mad. de Stael has told the world, tho' to be sure, very imperfectly and unworthily, what a genial & original literature has sprung up in Germany within the last 50 years like a volcano from the wastes & depths of the ocean.—But it is not what they have already done, or what they are at this moment doing, astonishing as both are, which makes me hope so much from these Germans. It is the free, & philosophical spirit with which they do it—the contempt of all ancient forms considered as such, and the exemption from all prejudice—above all, the unwearied activity with which they push forward, and the high objects they propose to themselves—it is this, that makes me feel sure, Germany is soon to leave all the rest of the world *very* far behind in the course of improvement—and it was this that determined me to remain here rather than to pursue my studies in countries where this high spirit has faded away.—

You may perhaps smile at all this, my dear Gilmer, and think that my reasons for spending above a year and a half in Göttingen are as bad as the revolution itself. If we live twenty years, however, & then meet one another, you will be prepared to tell me I have done right, for though the political machine may at last grind Germany to powder, yet I am satisfied that the spirit which was not extinguished or even repressed by the French Usurpation will not be stopped in its career by any revolution that is likely to happen before that time, and in twenty years German literature, & science, and learning will stand higher than those of any other modern nation. Mr. Terrel, of course, I have not yet seen, but in a little more than a year I shall, I suppose, find him in Germany ; & if I can there do him any service, you may be certain, that I shall not be found unfaithful to the remembrance of the many pleasant hours passed with you & owed to you in Philadelphia and Washington. Farewell. I will write to you soon again & you must write soon to me. Send your letters to *Boston* care of E. Ticknor & they will certainly



reach me. Where is Winchester? Tell me all about it & about your situation. If it is near Monticello, remember me when you are there, & tell Mr. Jefferson that my only regret in determining to stay here is that I cannot have the pleasure of purchasing his books in Paris. I hope, however, as I have told him, still to find some way of being useful to him in Europe.

Yrs truly, GEORGE TICKNOR.

FRANCIS W. GILMER, ESQ.,  
*Winchester, Virg.*  
Care of JOHN VAUGHAN, ESQ.,  
*Philadelphia.*

## II.

GÖTTINGEN Jan. 30. 1817.

Your very welcome letter of Oct. 11. 1816. my dear Gilmer reached me a few days since and I thank you for it a thousand times.—It afforded me pleasure in every part except that in which you speak of your feeble health. My dear Gilmer, take care of yourself. I say this from an experience, which makes my warning solemn, and which should make it efficient.—One of the very first things that struck me on coming to Europe was, that their men of letters & professions here live much longer and enjoy lively & active faculties much later than in America.<sup>1</sup> And what is the reason? Not because our students labour harder—not because they exercise less—not because they smoke more or for any other of the twenty frivolous reasons that are given by anxious friends among us, for these are all disproved by the *fact* here, that a man of letters works from 12 to 16 hours a day—

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<sup>1</sup> Here he adds on the side of the page—I have reduced this to an arithmetical fact by calculating the length of the lives of men of letters in Eng.(land) France, Spain, Italy, & Germany.

exercises not at all—smokes three fourths of his time &c &c. —The reason is, that every man must have habits suited to his occupations, whereas our men of letters are so few that they are obliged to adopt the habits of persons about them whose occupations are utterly different. Thus we get up late in the morning because breakfast is not to be had early with convenience to the family—we dine late because our dinner hour must conform to that of men of business—we give the evening to the world because it is the fashion—and thus having passed the whole day under the constraint of others, we steal half the solitude & silence of the night to repair our loss. Under the influence of such habits our men of letters in America seldom attain their fortieth year & often fall victims in the very threshold of active life. The great faults lie in the distribution of time and of meals.—A student should certainly rise early, not only because Sir John Sinclair's Tables show that early risers are always (*caeteris paribus*) the longest lived but because anyone who has made the experiment will tell you that the morning is the best time for labour. It has the advantages of silence & solitude for which we use the evening and the *great* additional ones that mind & body are then refreshed & quickened for exertion. In the nature of things therefore, the heaviest studies, whatever they may be, should be the first in the day, & as far as it is possible, I would have their weight diminished in each portion of time until they cease, because by the fatigue of exercise, the faculties become continually less capable of easy & dexterous exertion without being compelled to it by excitement which afterwards produces languor. Then as to meals—I would not eat a hearty American breakfast on first rising, for that is the very time, when as the body is already strengthened & restored by sleep, it needs least of all the excitement of hearty food. Still less is the intrusion of craving hunger to be desired.—For the first seven or eight hours, after rising therefore, I have observed it best to keep the appetite merely still by eating perhaps twice some very light food—bread & butter &

a cup of coffee &c—By that time the strength needs assistance & the principal meal in the day should be made, which with light food once or at most twice afterwards is sufficient until “Nature’s grand restorer” comes to fit mind & body for new exertions. Observe, I pray you, that the two last hours in the day should not as with us, be the hours chosen for the severest labour, but should as much as possible, be hours of very light reading, or absolute amusement & idleness for two reasons, because the mind & body are then weary whether we permit ourselves to feel it or not and because the excitement of hard study just before going to bed prevents us from enjoying “the sweet, the innocent sleep” which is so indispensable to refresh the faculties.—Now, my dear Gilmer, do not say all this is theory & whim, for I know it—I *feel* it to be fact. In America my health faded under eight, nine & ten hours study in a day and I have lived in Göttingen a year & an half and grown stronger on studying more than twelve hours a day. I rise at five o’clock in the morning and my servant brings me immediately a cup of coffee & a piece of bread—at IX I eat some bread and butter—at I I dine—between VII & VIII in the evening I take some light supper & at X go faithfully to bed & sleep the sleep that knows no waking.—I do not beg you to do the same, for I know not how much your health is reduced; but when you have applied the needful means and restored yourself to your usual strength—*then* I do beseech you to adopt this or some other system equally simple, strict and rational and do not fear the result.—I speak on this subject with an earnestness uncommon to me, for I have more than common reasons.—I have lost many friends though I am still young—some whose talents and acquirements would, in riper years, have given a new character to letters among us, and now that I live in the midst of men who have grown old under labour which always seemed to me without the limits of human strength and have compared the annals of literature in other countries with its condition here, I can look back and see how gradually

and surely the health and lives of nearly every one of these friends were destroyed by their conformity to the habits of the society in which they lived—by the inversion of their day in study and in meals—& in short, by attempting to live at once like students & like men whose occupations are anything but intellectual—Beware, then, of this, my dear Gilmer—The world expects a great deal from your talents and you can easily fulfill these expectations, if you will but preserve your health by accomodating your habits to the nature of your occupations.

When I began, I am sure, I intended to have said but a word on this subject.—You will not, however, mistake my reason. If I valued your health less, I should be less anxious to have you preserve it & if I had not placed a portion of my happiness on the continuance of your life & did not know that you are one who can fill so much of the chasm in our intellectual state, I should not have been betrayed beyond a letter's limit on a subject which after all hardly comes within the rubrics of correspondence.

You inquire after works on Jurisprudence and on Political Economy.—On the last there is very little in German Authors & what there is of good, is founded on Adam Smith & Burke. This is the consequence of their miserable political situation, divided into little independent Principalities, which makes all their political interests little & insignificant & thus prevents liberal general discussions on great interests & questions.—On Jurisprudence they have books to confusion & satiety; but few, I apprehend, that would much interest an American Lawyer, however extensive he makes his horizon, unless it be good histories & commentaries on the Roman Law, in which, however, the present state of its practice in Germany is, again, the chief point kept in view.—If you would like any of these (the best are in German not Latin) I can procure them for you through a friend who will pass the next summer here, though I shall not myself—while at the same time, if you should like anything from France or Italy I will gladly serve



you in person as I shall divide the year that begins in May between them. Command me I pray you without reserve, for besides the pleasure I should feel in serving you, I feel a gratification always in sending home good books, for I know I can in no way so directly & efficiently serve the interests of letters in my native country.

When you write to Monticello or visit there, I pray you that I may be remembered, for out of my own home I know not where I have passed a few days so pleasantly.—Remember me, too, yourself—write to me often directing your letters as before care of E. Tinckor Boston—& in your next tell me your health is better, if you would tell me what will most please me.—Yrs truly GEO. TICKNOR.

Addressed

FRANCIS W. GILMER, ESQ.,  
Winchester (Virg.)

Care of

JOHN VAUGHAN ESQ.

Philadelphia.

*Endorsed*—Forwarded by J.  
V. who having no letter  
himself wishes to learn some-  
thing of the traveller.

PHIL. April 26<sup>th</sup> 1817

### III.

ROME Nov. 25. 1817.

Your letter of May 2d., my dear Gilmer, reached me in Paris three months ago, since which I have, until lately, been in such constant movement that I have been able to write to nobody except to my own family. I thank you for it, however, with a gratitude as warm as if I had been able to answer it the same week I received it, and pray you no less earnestly to continue me the favor of your correspondence than if I had been able to do more to merit it. What grieves me the most, however, is the affair of your Books. You desire me to procure for you several works on law, literature &c but desire me first to consult with Mr. Terrel to know whether he had not already purchased them. This letter I

received only six days before I was obliged to leave Paris, and, of course, all consultation with him was impossible. I, however, did the next best thing, it seemed to me, I could,—I took the letter to Geneva—added to Mr. Terrel's list the books I did not find on it, for, on inquiry, I learned he, too, had been able to do nothing,—and gave him the address of the De Bures Booksellers, who, as they have twice sent Books to Mr. Jefferson & often to other Persons in America, will no doubt be able to send yours safely. Indeed, I trust, they have by this time reached you; and this is my only consolation when I think of them; for nothing gives me so much pleasure as to do precisely this sort of service to my friends; because I know how delightful and difficult it is for them to receive good books from Europe and how much more useful a service I render to my country by sending such than I can ever render in any other way. You will have your books I doubt not, but I should rather you would have had them through me.—

In Geneva, I saw a good deal of Mr. Terrel. I wish, we had a great many more young men like him in Europe,—for he is improving his time, I am persuaded, remarkably well, instead of losing it and worse than losing it, as ninety nine out of the hundred who come here, do. He is destined, I presume, by the course of studies he talked to me about, to be a Politician and though that is a kind of trade for which I have little respect in any country, I am glad he seems to be learning its elements with such enlarged & philosophical views; and especially that he mingles with it no small portions of physical science & literature. The old adage may be true in Europe respecting learning,—that it is better to cultivate a Province than to conquer an Empire—but really for an American politician and for any one engaged in the liberal administration of a free government, a little of that equivocal information that we call General Knowledge is absolutely indispensable and will prevent him from doing and saying a thousand of the foolish things our Politicians do & say

so often. Terrel, however, pursues his studies, as the professors told me[,] in such a manner, that all his important knowledge will really be thorough and, what it gave me no less pleasure to remark, he has so lived among the persons, with whom he has been intimately connected at Geneva, as to gain not only their respect but their affection, and confidence.

Since leaving Geneva two months ago, my whole journey has been mere Poetry ; and I have truly enjoyed myself more in this short space than in all the time that preceded it, since I left home. The Plains of Lombardy are the Garden of Europe and the world. When this phrase is applied elsewhere, I know very well how to interpret it and what qualifications are to be made ; but when I recollect the waste of fertility formed by the bed of the Po & its tributary waters—the bright verdure of the fields—the luxuriant abundance of the harvests—the several parcels of land marked by fanciful copses of trees—& the whole united by the graceful festoons of the vines, hanging with purple & heavy with the wealth of autumn—while everywhere about me were the frolicks and gaiety of the vintage, it seems to me as if I had been in fairy land or amidst the unmingled beauties of the primitive creation,

“for nature here

Wantoned as in her prime, and played at will  
Her virgin fancies, pouring forth more sweet  
Wild above rule or art, enormous bliss.<sup>1</sup>

And then, too, as soon as as you have passed the Apennines, you come upon the very classical soil of Roman literature and history and every step you take is marked by some monument that bears witness to their glories. This continues until you arrive, twenty five miles before you reach Rome, at the last village and enter upon the unalleviated desolation of the Campagna. I cannot express to you the secret horror I felt while passing over this mysterious waste, which tells such a long

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<sup>1</sup> Here a strange hand has inserted P. Le. B. V. v. 294.

tale to the feelings and the imagination or how glad I felt, as if I had awaked from a dreadful dream, when turning suddenly round a projecting height of Monte Mario, at whose feet the Tiber winds in sullen majesty along, Rome with its seven hills and all its towers & turrets & Pinnacles—with the castle of St. Angelo and the Dome of St. Peters—Rome in all the solemnity & splendor of the Eternal City burst at once upon my view—But, my dear G——, if I begin thus to tell you of all my (?) in my travel's history, I shall never stop.

Farewell, then ; and remember me always and write to me often.—Remember me to Mr. Jefferson with great respect, when you see him or write to him and believe me yours very sincerely

GEO. TICKNOR.

My address remains always the same—E. Ticknor, Boston.—





VII-VIII-IX

THE RIVER TOWNS  
OF  
CONNECTICUT.



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics present History.—*Freeman*

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SEVENTH SERIES

VII-VIII-IX

THE RIVER TOWNS  
OF  
CONNECTICUT

A Study of Wethersfield, Hartford, and Windsor

BY CHARLES M. ANDREWS

*Fellow in History, 1888-9, Johns Hopkins University*

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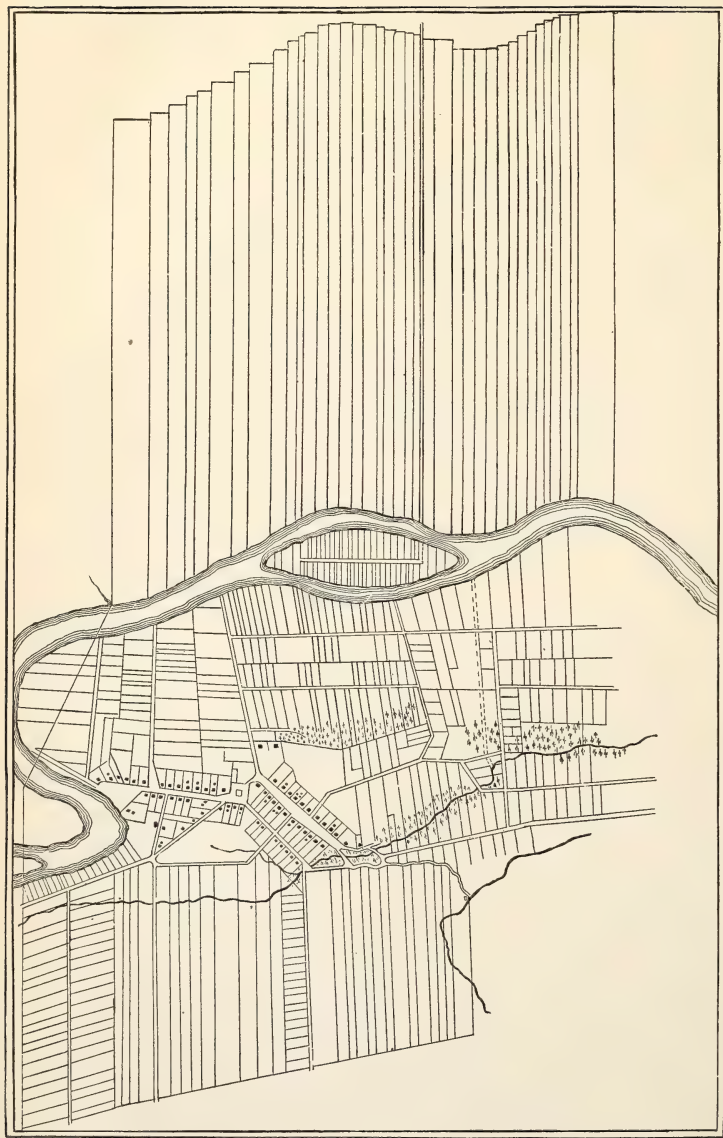
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#### EARLY ALLOTMENTS IN WETHERSFIELD.

The above represents the lands recorded under date 1640-41. On the extreme left are the West Fields, on the right, across the river, Naubuc Farms, known also as the Three Mile Purchase; in the centre the Great Meadow and Plain with their various divisions. The latter allotments cannot in every case be absolutely ascertained, as the records are often vague and faulty. For further explanation see page 42. Special thanks are due to Judge Adams for the

# THE RIVER TOWNS OF CONNECTICUT.

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## I.

### EARLY SETTLEMENTS.

#### THE DUTCH AND ENGLISH.

The spirit of trade inherent in the Teutonic life, and given broader and newer fields by contact with an unopened country, led to the first and more isolated settlements in the Connecticut valley. The English sense and mother-wit, sharpened on the Dutch grindstone, laid the foundation for the future Yankee shrewdness, so proverbial in all New England, and peculiarly so in the land of steady habits. This land, "excellently watered and liberal to the husbandman," was, up to 1632, chiefly conspicuous for its hemp, beaver, and petty Indian tribes. It lay, almost unknown, fairly between the settlements of the Dutch at New Amsterdam and Fort Orange, and of the English at Plymouth and Massachusetts Bay, and offered a tempting field for the first quarrel between the kindred nations. The same causes, the occupying of the vantage-ground, and the natural jealousy aroused by mutual successes, were at work here, as a hundred years later with the French in the larger territory of the Ohio; and here, as

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The writer wishes to express his indebtedness, in the preparation of this monograph, to Judge S. W. Adams, of Hartford, whose previous labors in the same field have been of the greatest service; to Miss Mary K. Talcott, of Hartford, who has placed many valuable notes at his disposal and has read a considerable portion of the MS., and to the town clerks of the several towns, especially Mr. Albert Galpin, of Wethersfield.

there, the English displayed the greater diplomacy and covert determination. As elsewhere, the first discoveries were made by another nation ; but the same prowess which brought about the greater final result in the settlement of America, led to the final occupation of this disputed territory by English communities and the reaping of its fruits by English hands. It was a bloodless victory, and the issue, though long debated, was finally decided by the weight of numbers and the tenacity of the English nature. The Dutch were merely traders with the Indians, while the English were wanderers seeking a permanent home.<sup>1</sup>

Until the meeting of the forerunners of each nation upon the banks of the Connecticut river, the relations had been eminently peaceful, and the Dutch had congratulated by letters and messengers the colonists of Plymouth on their prosperous and praiseworthy undertaking, and had offered to trade with them as honored good friends and neighbors. On the departure of De Brasières from Plymouth, after his visit in 1627, Governor Bradford addressed a letter to Minuit, the Dutch governor, cautioning him against allowing his people either to settle where they had no title or to extend their trade too near the English plantation. In the early days of their peaceful relations the Dutch had often recommended the Fresh River, "which is known by the name of Conightecute River," as offering peculiar advantages for plantation and trade, which information was treasured up for future use.

About this time the condition of Indian affairs in the valley was bringing the question of settlement more definitely to a head. The invading Pequots, who, after their retreat before the Mohawks from the Hudson river, had passed along the Connecticut coast and conquered the shore tribes, now made war on the weakly united Indians living to the north on both sides of the Connecticut river. A body of these conquered

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<sup>1</sup> Dexter's *New Netherland and New England*, New Haven Hist. Coll. III, pp. 443-469. Hazard, *State Papers*, II, containing the correspondence, 1644-1654, particularly pp. 212-218 and pp. 262-267.

Indians, banished from their own hunting grounds, made their way to the Plymouth colony, and endeavored to rouse the interests of the English in their behalf by extolling the advantages of the river for trade. This tale, containing two points for themselves and one for the English, was often repeated, and as the time was opportune for the latter—as they had on hand a surplus of commodities and a need for greater profits to meet their engagements—the settlers determined to explore for themselves the region recommended by the Indians. The expectations were not fully realized, however, for, though they found it, as Bradford says, “a fine place,” yet trade was dull. But it might be stimulated, and the Pilgrims, with always a keen eye, recognized the latent truth of the Indians’ report, and planned to build a trading house and to invite their fellow-colonists at the Bay to share in the advantages. In the meantime, the Indians, not satisfied with the conservative policy of the Plymouth people, had appealed to the other colonists. In 1631 a sagamore at Boston with two companions had proposed to the English there to come and plant the country, with the unexpressed but evident desire that they should assist them to recover their lost possessions. “The governor entertained them at dinner, but would send none with them,” and nothing was done in compliance with their request. During this episode, the men at Plymouth had taken action and had sent a number of men to spy out the land. Among these was Mr. Winslow, the governor, “who discovered the fresh river when the Dutch had neither trading house nor any pretence to a foot of land there.”<sup>1</sup> In 1633, partly in consequence of the knowledge already gained and partly because of his standing in the colony, he, with Mr. Bradford, formed the commission which went to the Bay to confer regarding a partnership in the hemp and beaver trade. This conference was without result, for the independent men of Boston, wanting all or nothing, refused any coöperation,

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<sup>1</sup> Hazard, *State Papers*, II, p. 215.



evidently thinking to thus discourage an enterprise the advantages of which they must have foreseen. The reasons given for this attitude are not in harmony with their spirit and courage thus far shown, viz. fear of warlike Indians, ice and swift currents, shallowness of the river, and lack of trading goods. Plymouth, however, was in earnest and prepared to carry out what was already determined upon, and thus its colonists were destined to be the "first English that both discovered the place and built in the same."

By this time the Dutch had waked up. On the 8th of June, 1633, a month before the above negotiations, they had purchased from the Pequots, lands on the river where Hartford now stands. On hearing of the plans of the Plymouth colonists, they set about the completion on these lands of a "slight forte," said to have been begun ten years before,<sup>1</sup> and equipped it with two small cannon and a force of men, probably few in numbers. This fort they called the "Good Hope," and with this military foundation they threatened to stop in their progress the stout gentry and yeomanry of England. But the fatal day for the Dutch had arrived, and their control in the Connecticut valley was nearing its end. Much as we may decry the high-handed manner with which the English treated their claims, based on a perfectly legal grant (as grants were then made) to the West India Company by the States General of Holland, we must confess it to our liking that matters were never allowed, through a firmer establishment of the Dutch in Connecticut, to approach a condition such as to require a resort to arms for their settlement.

The bark dispatched by the colony of Plymouth had a double danger to contend with. Having espoused the cause of the original Indians against the Pequots, they had gained the enmity of that powerful tribe, which was not likely to be

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<sup>1</sup> Mr. Savage doubts this (Winthrop's Journal, p. 113, note 1), and the Dutch give the date as 1633 in their complaint.

appeased by the fact that, according to the understood bargain, they bore with them in their craft Attawanott and other banished sachems, for reinstatement. Holmes, the Pilgrim captain, sailed up the river and passed safely the Dutch fort. The threats of its builders were as smoke without ball, though from behind its slender earthwork the garrison threatened and blustered. The resolute Holmes declared he had a commission from the Governor of Plymouth, and where that commission bade him go he was going, and go he did. He bought land of the sachems he carried with him, landed with a picked garrison, put up the ready-made frame-house prepared at Plymouth, sent the vessel home, and had his house well surrounded with a palisade before the Dutch could take any definite action. This was Saxon pluck; but if herein the Plymouth men showed themselves as wise as serpents, they afterwards displayed the ability of being as harmless as doves.

But there was still to follow another exhibition of Dutch bluster. Seventy men, girt about with all the panoply of war and with colors flying, appeared before the sturdy little trading house at the mouth of the Farmington. They marched up, but, fearing to shed blood, consented to a parley and withdrew. For the second time they learned that the English were not to be frightened away, and they apparently cared too much for their precious lives to try the ordeal of battle.

#### THE FORERUNNERS, OLDHAM AND OTHER TRADERS.

Hartford and Windsor had each now its military stronghold, of which we have still a survival in the names "Dutch Point" and "Plymouth Meadow." But as yet without other than Indian inhabitants were the wide-stretching lowlands of Wethersfield. Here the great river flanking the plain on the east, and bending its course at the northern extremity of the great meadow, formed a double curve, whose upper arc cutting deeply into the gently sloping ridge which formed the site for the future town, again turned abruptly northward

toward the forts of the Dutch and English. Up to 1633 no white man had set foot on these tempting fields. Adrian Blok, when in 1614 he explored the river as far as Hartford, saw there only Indian villages belonging to the Sequins; the later Dutch adventurers were traders, not agriculturists, and they sailed past the fruitful soil for a spot better capable of defense; Holmes had too definite a plan in his mind and too many other things to think of to be allured from the express commands of the Governor of Plymouth to go and settle above the Dutch, so that it was left for a restless English trader to first appreciate the possibilities of this quiet Indian valley. John Oldham, for many years a thorn in the flesh for the strait-laced colonists, came from England in the Anne in 1623; he was expelled from Plymouth as an intelligencer and creator of faction in 1624; was at Nantasket until the following year, when he returned to Plymouth without permission; again misbehaving himself, he was deliberately thumped on the breech out again, and went to Virginia, where through the agency of a serious sickness he reformed, acknowledged the hand of God to be upon him, and came back to Massachusetts Bay to live a respectable life. In 1631 he became a freeman of the colony, the privilege only of church members, and in 1632 owned a house in Watertown. This was the man who, early in September, 1633, started out from the Bay with John Hall and two other companions to trade in Connecticut. Plunging boldly into the wilderness, so soon to be made historic by a more famous emigration, they pursued a winding itinerary, in order to take advantage of Indian villages where they might lodge at night. On reaching the valley they were hospitably received by the sachem, possibly the one who had already visited Boston, and on returning, carried back to that colony beaver, hemp, and black lead. Regarding the southernmost point reached by Oldham we have no information. The distance to Connecticut was reckoned by him as one hundred and sixty miles. Allowing for the necessary windings incident to a journey through a

primeval wilderness, and supposing him to have reached for greater security the river at a point due west from the Bay, perhaps near Springfield, and then to have followed its course southward, the above impression which he received of the distance is easily explainable. That Oldham and his companions penetrated as far south as the then unoccupied sites of Hartford and Windsor is undoubted, and that he was the first white explorer of the lands still farther south in the present Wethersfield township, further evidence gives good reason to believe.

This overland journey of Oldham was with little doubt instigated by the desire of the colony to learn more of that promising land which, in the presence of the Plymouth representatives, they had so disingenuously decided not to meddle with. It looks a little like duplicity on the part of our Puritan fathers that, at the time of the bold, single-handed expedition of the Pilgrims in which they had refused to take part, they either dispatched or encouraged two private and almost covert expeditions into the same territory. For a month after Oldham's return, the bark *Blessing*, built at Mystic in 1631, explored the coast of Connecticut and Long Island, examined the mouth of the river, and appeared at the Dutch settlements on the Hudson. The Massachusetts men did nothing by halves. But if the reports of Oldham and the sailors of the *Blessing* were favorable to their purpose, those of Hall, who with a few others made a second exploration of the valley shortly after, must have proved somewhat discouraging. The latter encountered all the miseries of intense cold, loss of their way, and small-pox among the Indians, in consequence of which they had no trade. The only grain of comfort to be derived therefrom was that the small-pox had carried off most of the Indians, whose numbers had been up to this time a serious obstacle.



## UNEASINESS AT THE BAY.

No further attempts at settlement were made this year, but in the meantime affairs at the Bay were approaching a crisis unique as it was remarkable and momentous in its consequences. The antecedent events are most important as adding their weight in bringing about a movement whose causes lie deep-hidden in the history of Massachusetts Bay colony. Newtown, one of the neatest and best compacted towns in New England, lay fairly between Watertown on the west and Charlestown on the east, being in form, as Johnson says in his *Wonder-Working Providence*, "like a list cut off from the broadcloth of the two forenamed towns." In consequence, its people were somewhat crowded. In 1633 its population increased rapidly, and the question of removal or enlargement began to occupy their thoughts. There were twelve towns or churches in the colony, and the steady though not rapid accessions from England, while certainly not sufficient in quantity to cause the settlement to be overstocked, were such in quality as to create a strong-charactered minority. As will be seen, the mere extension of their narrow quarters was not enough to satisfy the men of Newtown, and this fact points to some deeper reasons for removal than those openly given. Whatever the causes, signs of discontent are evident from the time of the arrival of Thomas Hooker in 1633. By 1634 these discontents had gained such prominence that a complaint was made to the first general court of delegates by the people of Newtown, and leave was asked to remove or to enlarge their boundaries. This was granted provided they did not interfere with any plantation already established. Having gained her point, Newtown at once sent certain of her number to make explorations and select suitable places for removal. They at first seem to have had in mind a northerly emigration, and visited Agawam (Ipswich) and the Merrimac river; but evidently the reports of Oldham and others had been sufficiently favorable to turn their thoughts to the Connecticut valley, for in July, 1634, six Newtowners went

in the Blessing to explore the river, "intending to remove their town thither." Whether Oldham was one of these six is doubtful, as he lived in Watertown, though not at all improbable, as he was the chief authority among the neighboring towns on all Connecticut matters. This open intention to remove beyond the jurisdiction of Massachusetts caused a revulsion of feeling—certainly natural enough—and in September the subject came up again for discussion. Newtown wished to remove to Connecticut and prayed for leave to carry out her purpose. The application met with strong opposition from the deputy governor and a majority of the assistants, but of the representatives, fifteen were in favor of the motion to ten against, a fact which showed that the sympathy of the representatives of the people lay with the people themselves. Rather than make trouble in the present heated state of the controversy, Mr. Hooker postponed the intended migration until the bitter feeling should have passed away and a more favorable opportunity should offer. A day of humiliation was appointed and the derelicts indirectly reproved in a sermon by Mr. Cotton. But whether it was the humbleness engendered by the day of prayer or the penitence developed by Mr. Cotton's discourse, or a politic restraint of their feelings in view of the adage that "all things come to him that waits," the people of Newtown accepted the grants of meadow and river bank offered by Watertown and Boston for an extension of their territory.

#### SETTLEMENT OF WETHERSFIELD, 1634.

During the interim before the next meeting of the General Court there is some evidence of an exodus from Watertown to Connecticut. It is based on indirect rather than on direct evidence. There has long been a tradition that a few Watertown people came in 1634 to Connecticut and passed a hard winter in hastily erected log huts at Pyquag, the Indian name of Wethersfield. Tradition is apt to contain a kernel of truth, and in this case further evidence seems to substan-

tiate it. In case such a movement took place from Watertown, whether because of the decision of the Newtown people to remain, or independent of it, it is unlikely that Oldham would have failed of coöperation with the movers, if he was not actually the instigator of the plan itself. Does the evidence allow his absence from Massachusetts at this time? In 1634 he was elected first representative from Watertown, and was present at the meeting of deputies in May of that year. His continued presence at the Bay can be traced to September 25, when he was appointed a member of two important committees. His name is not again mentioned until the next year, when, according to the records, he was, in May, 1635, appointed to act again as member of an investigating committee.<sup>1</sup> After his service the previous year he was not again elected deputy, and this may have been, as Dr. Bond suggests, because of his open intention to remove to Connecticut,<sup>2</sup> as that intention, if carried out at any time before the next meeting, in May, 1635, would incapacitate him from serving as deputy at that court. Thus it is quite possible for him to have been away from Massachusetts at this time. Is there any trace of his presence in Connecticut between September, 1634, and May, 1635? If so, which is the more probable date? His presence in Massachusetts in 1635 can be readily accounted for by supposing a return from Connecticut after the traditional winter of suffering at Wethersfield. For light on this point we must turn to the records of the Connecticut colony. There we find the entry of the settlement of the estate of Mr. John Oldham (he was killed by the Indians in July, 1636) in the records of a court held at Watertown (Wethersfield) in September, 1636. Among them is the following: "It is ordered that Thurston Rayner, as he hath hithertoo done, shall continue to look to and preserve the corn of Mr. Oldham, and shall inn the same in a seasonable

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<sup>1</sup> Mass. Col. Rec. I, pp. 116, 125, 145.

<sup>2</sup> Bond, Hist. of Watertown, p. 864.

time.”<sup>1</sup> Two facts are noticeable in this entry: first, that Rayner, who arrived in 1635, was given charge of Oldham’s unharvested grain because he had performed a similar office before; and, secondly, that Oldham could not have been continuously present at the plantation, but seems to have been accustomed to take occasional journeys away. The first fact points to a harvested crop of grain the year previous, which, if winter-sown, would argue in favor of his presence there during the winter of 1634-5, or, if summer-sown, a later appearance in the spring of 1635. We are then assured of his presence there at one or the other of these two dates. The second fact would allow his absence in 1635 in case the settlement was made the fall previous. This is not at all unreasonable. He left a family at Watertown; retained property there, an inventory of which is found in the Massachusetts records after his death. These double interests would have been more than likely to have required his presence at times in each plantation, and he was sufficiently acquainted with either route—overland or by sea—to have taken the journey without great inconvenience.<sup>2</sup> The lands held by him in Wethersfield were most favorably situated and of a nature to warrant the presumption that he, as leader of a party, had the first selection, while the eight adventurers accompanying him took adjoining lands farther south in a less convenient situation. We know that in England at this time the winter-sowing of wheat between Michaelmas and the last of November was the rule rather than the exception, the former date marking the beginning of the farming year. Mr. Bradford seems to imply the same when he speaks of those coming over in May as being obliged to wait “upward

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<sup>1</sup> Conn. Col. Rec. I, p. 3.

<sup>2</sup> It is likely that Mr. Oldham made frequent trips back and forth between the two colonies. See the letter of Mrs. Winthrop to her son, at that time Governor of Connecticut, dated April 26, 1636, in which she speaks of sending (from Massachusetts Bay) a letter by Mr. Oldham to Connecticut. Winthrop’s History, vol. I, p. 466.



of 16. or 18. months before they had any harvest of their own,"<sup>1</sup> evidently referring to a winter-sowing of wheat, which with barley formed the chief staple. All this we think leads to the confirmation of an autumn settlement in 1634, but another bit of evidence is at hand. A town vote, under date August 30, 1711, relating to a suit brought against the town for possession of the stated commons and sequestered lands, has the following explanatory clause: "The town having possessed and enjoyed said lands for seventy and seven years last past or more, viz., themselves and their predecessors of the town of Wethersfield, and having measured and laid out the said commons or sequestered land more than twenty-seven years last past, and some of the land more than thirty years last past."<sup>2</sup> By deducting these years from the date of the vote we find that the town in 1711 considered the date of her own settlement to be 1634, and as in the case of the other years mentioned the statement is absolutely correct, there is no reason for doubting the truth of the first; if this be tradition, it is of a very fresh and trustworthy sort, and assists materially in forming our conclusions.

With this then as our evidence, we venture the following historical sequence. Shortly after the September meeting of the Massachusetts General Court in 1634, Mr. Oldham led a party of eight adventurous men to the point reached by him on his overland journey in 1633, where he was impressed by the fertility and beauty of the river meadows and the fact of a non-occupation by white men. Here huts were erected, the ground prepared and grain sown along the lowest eastern slope of the ridge, half a mile from the river, out of reach of the spring freshets. In the following spring Mr. Oldham returned to Watertown, and very likely his presence once more among the uneasy people instigated the petition which was presented by them to the court held in Newtown, May 6, 1635, asking leave to remove. A favor-

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<sup>1</sup> Bradford's History, p. 248.

<sup>2</sup> Weth. Records, I, p. 292-3.

able answer was given to this, and Mr. Oldham accompanied a second band of settlers, some fifteen or twenty in number, who settled in Wethersfield, near the others, to the westward. We are without doubt warranted in the statement that of the three towns composing the Connecticut colony, Wethersfield was the first occupied by settlers and planters who became an integral part of the later community. It is interesting to note that this fact is acknowledged in the general code of 1650<sup>1</sup> and in the manuscripts of Mr. Mix (1693-1737).<sup>2</sup> The existing state of things is, then, a Dutch fort of doubtful permanency at Hartford; a strong, well-established palisaded block-house at Windsor; both of these engaged in trade with the Indians; and a small handful of planters—some twenty-five or thirty—in the meadows of Wethersfield—all in the midst of half friendly and hostile Indians.

#### PLYMOUTH AND DORCHESTER. THE LORD'S WASTE.

But a rift once made for the outpouring of the tide of emigration and the efflux became rapid. A month after permission was granted to the Watertown people a like leave was given to those at Dorchester, with the same proviso regarding jurisdiction. Within two months—by August 16, 1635—a settlement was made by them on the Connecticut. Their

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<sup>1</sup> In the section "Bounds of Towns and Particular Lands" is the following: "It is ordered . . . . That every Towne shall set out their bounds . . . . and that once in the year three or more persons in the Towne appointed by the Selectmen shall appoint with the adjacent Townes and renew their markes . . . . the most ancient Towne (which for the River is determined by the courte to be Weathersfield) to give notice of the time and place of meeting for this perambulation." Col. Rec. I, p. 513.

From the point of view of a habitation by white men, Hartford was first occupied by the Dutch; from the view of occupation by Englishmen, Windsor can claim to be the earliest settled; but from the point of view of settlement by Massachusetts Bay people, by agriculturists and permanent colonists, Wethersfield has undoubted right to the title. On Windsor's claim see article by J. H. Hayden in *Hartford Courant* for September 26, 1883.

<sup>2</sup> Trumbull, *Hist. of Conn.* I, p. 49, note.

unfortunate selection of the lands adjoining the Plymouth block-house led to a lengthy dispute and considerable ill feeling between the two colonies. The one claimed priority of possession and rights acquired by purchase, and warned the new-comers against trespassing. The latter, disregarding these stable claims, plead the providence of God as having tendered the place to them "as a meete place to receive our body, now upon removal." But the Pilgrims were not inclined to accept this somewhat illogical reasoning, thinking the "providence of God" to be a convenient pretext, not altogether reliable as argument. In their rejoinder they say what was not far from the truth, though edged with a Pilgrim bitterness: "We tell you still that our mind is otherwise, and that you cast rather a partiall, if not a covetous eye, upon that which is your neighbours and not yours; and in so doing, your way could not be faire unto it. Looke that you abuse not Gods providence in such allegations." The controversy continued, with the passage of many letters back and forth between them; but the Pilgrims, rather than make resistance, though they had been bold enough to have done so, came to an agreement with the others, first compelling a recognition of their right to the "Lord's Waste," as the Dorchester men called the land in dispute. This recognition proved something of a stickler to the authorities at home, and Mr. Winslow the following year went to Dorchester to settle the controversy. Winthrop here gives another exhibition of Puritan disingenuousness. As the claim of jurisdiction was too doubtful to maintain, he falls back on the assertion that the Plymouth traders had made their settlement through leave granted by Massachusetts, after the latter had refused to join in the undertaking. The leave granted is certainly gratuitous on the part of the Puritans, for Plymouth, settled ten years before the colony of Massachusetts Bay, did not come into her jurisdiction until 1692. Perhaps we may ascribe this rather peculiar sense of equity to the workings of a manifest destiny, to which it is con-

venient to ascribe so much ; but if we do so, then there is reason to believe that such destiny does not always follow along the lines of greatest justice. The means for creating an illustrious future are not always in accord with present happiness and harmony. The controversy was finally ended two years after by a compromise, in which Plymouth, to have peace, yielded all save the trading house and a sixteenth of the purchased land to the Dorchester people (inhabitants of Windsor), with a reservation, however, to the southward for the Hartford adventurers, who were Newtown people, and about twelve in number. This disputed "Lord's Waste" is now the town of Windsor. Of course the lands surrendered were duly paid for (price £37 10s.), but the "unkindness" of those who brought on the controversy "was not so soon forgotten." While this dispute was in progress—for the above compromise advances our narrative two years—a third claimant appeared. This was the Stiles party, which, sent from England by Sir Richard Saltonstall, one of the Connecticut patentees, had arrived in Boston, June 16, for the express purpose of settling in Connecticut. They were sent out from the Bay ten days later, and probably arrived some time after the 6th of July. This party of servants numbered sixteen, and included three women, the first of their sex in the Connecticut valley. They at once laid claim to a share in the "Lord's Waste," but the claim was evidently not pushed with vigor in the face of such opposing odds, and, with wise discretion, they retired a little farther up the river. Their little plantation was afterwards included in the Windsor township, and its members shared in the distribution of lands in 1640, in September of which year Francis Stiles was admitted a freeman.

#### HARTFORD. A HARD WINTER.

But our list of those who were to endure the seasoning of a most rigorous winter is not quite complete. We have already mentioned the reservation of a moiety of land, as one



condition of the settlement of the controversy regarding the "Lord's Waste," for certain emigrants from Newtown, who had settled on what was later called the "Venturer's Field" in Hartford. These settlers did not arrive all at once, but evidently formed a part of the Massachusetts men whom Brewster states, under date July 6, 1635, as coming almost daily. Few in numbers, they took no part in the unfortunate controversy between Dorchester and Plymouth. Either because of their weakness, or because of the patient, uncontroversial spirit which they displayed, they were kindly and generously treated by Holmes and his party, who reserved for them in the condition of sale in 1636—the sale took place the next year—a portion equal to that retained by themselves. This land the men of Newtown took gladly, desiring no more than could be conveniently spared them, thus gaining for themselves the approbation of their neighbors, and making the way easier for the later exodus of the Newtown Hookerites. Even the first comers hallowed the ground, "the birthplace of American democracy," with a godly spirit.

As to the question of jurisdiction the problem is simple. All were legally trespassers.<sup>1</sup> In the absence of a grant by the council of Plymouth of this territory to the Earl of Warwick, which grant is now shown to be a figment of the brain,<sup>2</sup>

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<sup>1</sup> Johnston, Conn., p. 10 ; Bronson, *Early Government*, New Haven Hist. Soc. Papers, III, p. 295.

<sup>2</sup> In the record of sale of the Fort of Saybrook by Mr. Fenwick to the colony, which has been claimed as the basis of the jurisdiction right of Connecticut to the territory, occurs the following section: "The said George Fenwick doth also promise that all the lands from Narragansett River to the Fort of Sea-Brooke mentioned in a patent graunted by the earl of Warwicke to certain Nobles and Gentlemen, shall fall in under the Jurisdiction of Connecticut if it come into his power." This section, which seems to promise much, is in fact a much-broken link in the chain of so-called evidence, as it fails of connection at each end. As no patent granted to Warwick can be found, it is evident that he could not give a legal title to Lords Say and Sele and others, the nobles and gentlemen named above, of whom Fenwick was the agent. Again, notwithstanding Mr. Fenwick's agreement, no such conveyance was ever made, as Mr. Trumbull has clearly proved on documentary evidence.—Conn. Col. Records, I, Appendices III and XI.

no one of these various claimants could assert any legal title, other than that obtained by the enforcement of Indian contracts by force of arms. The smaller rights thus based on occupation or purchase were all that seriously concerned the practical colonists, and they pursued their way, generally all unconscious of an occasionally dark cloud which threatened to drive them from their hard-earned homes.

The story of settlement has thus far been concerned with individual enterprise, carried out either in the personal interest of trade, or in the interests of a larger body who assisted and encouraged it. All such movements are legitimate factors in the final issue, and the forerunners differ in no respect as settlers from those larger bodies with which they soon became fused, and in union with which they built up the future towns. Nearly all became proprietors and later inhabitants, and so are to be looked upon equally with the others as sharers in the honor of founding a commonwealth. Before the differences already mentioned had been permanently settled, and while the Dorchester emigrants were subduing the fields and forests of Windsor for habitation, in spite of the Plymouth land claims, word was returned to their townspeople left behind that the way was prepared. On the fifteenth of October there started from the Bay colony a body of sixty men, women and children, by land, with their cows, horses, and swine. Their household furniture and winter provisions had been sent by water, together with probably a few emigrants to whom the overland journey would have proved too tedious. The majority of these people were from Dorchester, but accompanying them were others from Newtown and Watertown, who joined their townspeople on the ground they were cultivating.<sup>1</sup> But they had chosen a

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<sup>1</sup> There is considerable difference of opinion as to when Mr. Warham, the pastor of the church in Dorchester, of which most of these people were members, came to Connecticut. Dr. Stiles says in 1635 at the time of the above migration (*Hist. of Windsor*, p. 25). Rev. Mr. Tuttle says in the spring of 1636 (*Mem. Hist. of Hart. County*, II, p. 499), while Dr. B.

most unfortunate season. Hardly had they settled when all the ills of winter began to come upon them. The brave Puritan heart quaked before these ominous signs of approaching distress. Frosts, snow, insufficient shelter, scarcity of food, difficulty of caring for and preserving their cattle, and a consequent heavy mortality, were but few of the horrors of that winter of 1635-36. Many attempted a return. Six in an open pinnace suffered shipwreck, and after days of wandering reached Plymouth. Thirteen attempted the overland route. After ten days, twelve reached Dorchester, having lost one of their number through the ice, and the remainder only saved themselves from starving by the happy discovery of an Indian wigwam. The river was frozen over by November fifteenth, and snow was knee-deep in Boston. At length even sturdy Saxon blood could stand no more; death from cold and starvation was at hand, and the new-found homes were for the most part abandoned. Seventy men and women pushed their way southward to the river's mouth, to meet the Rebecca with their household goods and provisions on board; she was found frozen into the ice, unable to proceed farther upward. Fortunately a warm rain set her free, and all embarking

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Trumbull places it as late as September, 1636 (Hist. of Conn. p. 55). The evidence is so slight as to allow the holding of any one of these views. Under date of April 11, 1636, Winthrop says, "Mr. Mather and others of Dorchester, intending to begin a new church there (a great part of the old one being gone to Connecticut), desired the approbation of the other churches and the magistrates," but on a question of orthodoxy, "the magistrates thought them not meet to be the foundation of a church, and thereupon they were content to forbear to join until further consideration." In the next paragraph, Winthrop says, evidently referring to those mentioned above in parenthesis, "Those of Dorchester who had removed their cattle to Connecticut before winter, lost the greater part of them this winter." And again Winthrop says, under date August 23, 1636, "A new church was gathered at Dorchester, with approbation of magistrates and elders," etc., referring without doubt to the deferred meeting mentioned above. In view of this it seems unlikely that the Dorchester church would have remained all winter without a pastor, and that the gathering of a new church took shape at once on the departure of the pastor in the spring of 1636, some time before April 11.

returned to Massachusetts, arriving there on the tenth of December. Those who remained suffered the chastening which was to make them a great people. All were soon cut off from retreat by land or sea. Some perished by famine; the Windsor people lost nearly all their cattle, £2000 worth; and acorns, malt, and grains formed their chief sustenance. Yet this settling and jarring of a hard winter prepared a firm foundation for the structure that was soon to follow thereon. If the year 1633 marks the laying of the corner-stone, the year 1636 saw the completing of the foundation and the perfecting of the ground-plan for a stately commonwealth.

#### CONNECTICUT PLANTATION.

The plantation had already, in the autumn of 1635, attained sufficient size to be the object of legal recognition, and a constable was temporarily appointed by the Massachusetts court. This local representative of the central authority seems to have been the only outward and visible sign employed in the admission to an equality in the sisterhood of towns of a sufficiently developed candidate. If Massachusetts, with her more artificial system of government, used any other method of recognition in addition to the act of the General Court, it is certain that the precedent set in the case of the first Connecticut plantations was ever after followed. But Massachusetts believed in preserving the law of continuity by reserving the power to her own magistrates of swearing in any constable chosen by Connecticut under the decree giving that plantation permission to make the choice for herself. It was the principle of constabular succession. But slowly there was evolving out of what had been, in the eyes of the Massachusetts court, one plantation of her people on Connecticut soil, three centers of settlement, and one constable was too small a quantity to suffer a tri-section of his powers. In March, 1636, the as yet uncentralized spirit of law and order began to take definite shape, in a provisional government provided by the General Court of Massachusetts. This government was com-



posed of eight prominent men, dwellers along the river, who were authorized to act as a court for investigation and decision, as a council for the issuance of necessary decrees, and as an administrative body for the carrying out of such decrees, either directly or indirectly, through the medium of the separate settlements. This court met eight times between the 26th of April, 1636, and the 1st of May, 1637. One of its earliest acts was to officially declare the tri-partite plantation, made so by the exigencies of its settlement and the triple origin of its people, to be composed of three towns, by the creation of three constables, one for each group of inhabitants. While we may say that this began the official system, it practically only declared the three settlements to be independent military centers, each with its cannon, its watch and individual train-band; and this is a very different thing from calling them towns fully equipped with all the paraphernalia of town government. The further duties of the court related to those matters which concerned the whole, with special reference to increasing the power for self-support and perfecting the bounds of the half-formed towns. By the terms of its commission, this government was to last but a year, and in the court which succeeded it the people found representation through committees, undoubtedly chosen at the request or order of the provisional government, or summoned because of the special emergency which demanded some action to be taken against the Pequots. The proceedings of the next four General Courts relate solely to that war.

### THE OUTPOURING.

The period of unicameral government was the time of greatest emigration, "the special going out of the children of Israel." Those whom the rigors of winter had terrified returned. With them were many others who had until this time been unable to arrange satisfactorily the disposal of their property and a settlement of other affairs before leaving. It is worthy of note that many of the Connecticut settlers

continued to hold lands in the Bay colony for some time after their withdrawal to Connecticut. At their head was Mr. Warham, the surviving pastor,<sup>1</sup> and this accession, perhaps occurring a few weeks before the formation of the provisional government, brought about its more speedy erection.

In June of this year a majority of the Newtown Church, under the leadership of Mr. Hooker and Mr. Stone, traveled under summer skies through the forests over highland and lowland for a fortnight before reaching their river home. They drove their flocks and herds, subsisted on the milk of their cows, bore their burdens on their backs, and thus their journey was an after-type of those earlier and greater southward and westward wanderings of their national grandparents in the older times. It was the bodily transportation of a living church. No reorganization took place. The unbroken life of the transplanted churches of Hartford and Windsor drew its nourishment from roots once set in Massachusetts soil. New churches took the place of the old, but an ancestry of five and six noble years belongs not to their history, but to the history of the Connecticut churches. With Wethersfield the case is different. The settlement was the work of individuals; a reorganization took place on Connecticut territory, and is recorded in the proceedings of the first court held under the provisional government. Thus, of the three river towns, Wethersfield was the most independent of all links connecting her with Massachusetts.

#### LESSENING OF EMIGRATION.

Every effort was made by the home government at the Bay to check this flow of emigration, or, at least, to turn its current into more adjacent channels; but the bent of the emigrant's spirit was toward Connecticut, and for the time being the colonial government was helpless to prevent it. That their efforts were not confined to the large grants of land made to the Dorchester plantation and other legitimate means

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<sup>1</sup> See note, p. 21.

of quieting the uneasiness, Hooker's letter to Governor Winthrop incisively shows.<sup>1</sup> He calls a series of misrepresentations by the Puritans at the Bay "the common trade that is driven amongst multitudes with you." The emigration grew less and less until 1638, and though large numbers came to Massachusetts that year, very few seem to have come to Connecticut. For this fact Mr. Hooker's remarkable statements are certainly a partial explanation. The Pequot war was not without its effect, but the Massachusetts men without doubt abused Connecticut. They raised pretexts for the effectual frightening of all who projected settlements there. Such settlers might—if they must go from the Bay—go anywhither, anywhere, choose any place or patent, provided they go not to Connecticut. The report was spread that all the cows were dead, that Hooker was weary of his station, that the upland would bear no corn, the meadows nothing but weeds; that the people were almost starved in consequence. Such reports, spread abroad in the streets, at the inns, on the ships before landing, and even in England before embarkation, are a little astounding. Even the Indians, wherever they got their notion, called them water-carriers, tankard-bearers, runagates whipped out of the Bay. As Hooker says, "Do these things argue brotherly love?" It would hardly appear so, and we must confess that in all their relations with their brethren and neighbors in the Connecticut valley, the Puritans showed little of that austere honorableness for which they are famed. Harsh necessity may have seemed to them an all-embracing excuse, but however that may have been, we must plead that even within the dark shadow of necessity, principles of fairness and equity should find a place.

As before intimated, by 1637 the tide of emigration had almost ceased. After-comers were not few, indeed, but the movements which gave birth to a new colony had practically reached an end. The coming of later settlers added no new

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<sup>1</sup> Conn. Hist. Soc. Collections, vol. I, pp. 1-18.

features to the principles according to which the colony was projected.

#### MASSACHUSETTS AND CONNECTICUT.

From nearly every point of view, the civil, ecclesiastical and military life of the colony was far simpler and more natural than elsewhere on the American continent. It was the outcome of a second sifting from the complications of government in England. Its founders were twice purged, and in their revolt from the already purified government in Massachusetts, they evidenced how thoroughly democratic their principles must have been to have found themselves out of harmony with the latter's policy, that is, the policy of the central government; for the Massachusetts Puritans could not rid themselves of many of the associations in which they had been reared. Among them were men who looked longingly at the institutions of Old England and desired their reproduction. The equality of all was not to their taste, and they sought to establish a privileged class, to nullify the representation of the freemen by throwing all power into the hands of the assistants; they endeavored to create a life tenure for the governor, and to make the influence of the towns always subordinate to that of the colony, at whose head was a conservative aristocracy; state was linked to church, and the influence and direct interference of the clergy was great. It was an aristocracy, oligarchy, theocracy, but only in part a democracy.

Thus it was that the English settlements in Massachusetts failed to reproduce in many respects the conditions of a rational democracy. It was a compromise between the spirit of the past and the associations of the present. As a consequence, the dominant class and the commons, the central government and the towns, were continually at variance. This led inevitably to a split and the withdrawal of portions of their number into freer fields for an exercise of their Saxon heritage, the general power of all over general interests, and the



local power of each over local interests. This is self-government, severed from the influence of special class privilege, civil or ecclesiastical. It was the spirit of democracy given free development on a free soil.

The Connecticut central authority began, it is true, before the towns had fairly come into being, but it was a superimposed power, and when the colony erected its own General Court and established its own Constitution, it was found that the people held the check-reins.

To these people belonged the choice of magistrates, and the divine right of kings found no place, except as those in authority were chosen and upheld in office "according to the blessed will and law of God." In the people lay the foundation of authority, and therein a liberty which, as God-given, was to be seized and made use of. As those who have power can give and also justly take away, so the people could set bounds and limitations to the power of their magistrates, and of the places to which they had called them. No tenure for life, no papal infallibility there. Those in authority were weak creatures and liable to err, and as the burdens were heavy, so should censure and criticism give way before honor and respect. Popular election began at once on the assumption of its own government by the colony, and the committees to whom the people delegated their authority were no mere figureheads. They did not toy with government, electing the Assistants and then leaving to them all legislation, as in Massachusetts, but they formed a powerful lower house, which coöperated in the functions performed by the General Court. We may be sure this to have been so of a people who, in the Fundamental Articles, avowed their right, in case the Governor and Assistants refused or neglected to call the two General Courts established therein, of taking the control into their own hands: a House of Commons without King or House of Lords.<sup>1</sup>

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<sup>1</sup> This privilege seems to have been but once exercised, and then under very different circumstances from those mentioned in the sixth funda-

## THE SOVEREIGN PEOPLE.

Yet these same people, in whom lay the sovereign power, gave up that power at the proper time into the hands of the General Court, without reservation. If between 1636 and 1639 the towns were independent republics, each sufficient unto itself, it was only so by virtue of a vivid imagination. It is dignifying with too sounding a title these collections of proprietors, who, busied about the division and cultivation of their lands, and with an as yet unformed system of self-government, looked to their magistrates and elected deputies in these three years for the ordering of those matters which concerned a sovereign state. But, from the date of the adoption of the Fundamental Articles, these towns lost what elements of legal independence they may have had before, and, by the free will of the people inhabiting them, became merely machines for the administration of local affairs, for the apportionment of representation and taxation, and for the carrying out of such powers as the General Court committed to them. They had no inherent or reserved rights. As far as the wording of the tenth section is concerned, complete power was given for the control of all that concerned the good of the commonwealth, with but one reservation to the whole body of freemen—the election of magistrates. The towns never had been sovereign; in fact, they did not become fairly organized towns much before the adoption of the Constitution, and it is not improbable that such adoption was delayed until the colony had become well established, in working order, and its people accommodated to their new environment. A sure foundation for the Constitution must have been laid before that document could be drafted and adopted with reason of success.

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mental. In 1654, on the death of Governor Haynes and the absence of Deputy Governor Hopkins in England, an assembly of freemen met in Hartford, to choose a Moderator of the General Court, who had power to call the next General Court for the election of a Governor and to preside over its meetings.—Col. Rec. I, p. 252.

Another most important evidence of Connecticut democracy must be noted and briefly dismissed. The suffrage of the Connecticut colony was unrestricted by ecclesiastical obligation. In Massachusetts and New Haven no one had a right to vote unless he was a freeman, no one could be admitted a freeman unless he was a church member ; the church was congregational, wherein its affairs were managed by the votes of its members. Town and church were one. But in Connecticut, for the first twenty years, it was only necessary that each freeman have been admitted an inhabitant in the town where he lived, by vote of the majority of the inhabitants in town-meeting. Church and town were theoretically dissociated, though not practically for many years, and the government of Connecticut was, as near as possible in those days, by the people and for the people.

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NOTE.—THE HISTORIC TOWN.—In nearly all the New England settlements the lay-out and organization of the towns were similar. Historically, this institution is purely English. Among the other Germanic nations the unit of constitutional machinery is the Hundred, corresponding to our county. The Celts and Slavs never developed local government by themselves, and the Romance peoples were governed, so to speak, from above, not from within. Yet, whatever may have been the constitutional development of the village community as acted upon by feudalism and the growth of centralized monarchy, there are certainly curious analogies to be found between certain phases of early New England town life and some of the oldest recorded customs, as seen in the extant laws of early German tribes. Many of these can be shown to have been retained in the English parish, and their presence can be explained by acknowledging a previous acquaintance on the part of the Puritan settlers. But, though other analogies, such as the laws against alienation of land, the spirit of town exclusiveness in the fullest sense, and the peculiarly individual and democratic nature of the town meeting, cannot be thus accounted for, they may be shown by the unbelievers in the Germanic origin to have arisen from reasons of economic necessity, and to be nothing more than interesting parallels. This would be the case with those who declare that the "town meeting is an outgrowth of New England life," and that "it had its origin with the first settlers." (S. A. Green, *Records of Groton*, Introd.) However, if the views of v. Maurer and Sir H. Maine are to be retained, who have pictured for us a system of Arcadian simplicity, a kind of Eden for the historical student, and we are to talk about

identities and survivals, then the purity of such a condition has been destroyed by the political development of those countries, which can trace back, with plenty of imagination when historical data are wanting, to this simple germ the thread of their history. For these germs, these peaceful congregations of our Aryan forefathers, were certainly destined never to be reproduced in the form given us by the scholarly exponents of the village community theory. There is more that is unidentical than there is that is identical. If we have been given correctly the original form, then it has suffered rough usage in its intercourse with the events of known history. The superstructure has had to undergo the changes which centuries of political modeling have brought about, so that wherever we find traces of the early village community life, they have to be dragged as it were from beneath a mass of irrelevant material necessary to the existence of a modern political unit. It is not strange that this political cell should never have been reconstructed in its entirety on the migration of peoples to England and later to America, for it is a much mooted point whether it had not largely lost its identity before Tacitus wrote about the Germans. It was fitted for only a primitive, half-civilized kind of life, where political craftiness was unknown, and the inter-relation of man with man and state with state still in very early infancy. But whatever form of local life, the village community, or the manor, or both, the Angles and Saxons carried to England, there is no doubt that within that form were embraced many of the foundation principles according to which the German *tun* is supposed to have been built; and that many of these customs, political, legal, social, agrarian and philological, were brought by the settlers to America, no reasonable scholar will pretend to deny.



## II.

## THE LAND SYSTEM.

## ORIGINAL PURCHASE.

The tribes of Indians which dwelt along the Connecticut river had little unity among themselves. They were scattered bands, and on the coming of the Pequots the slender ties which joined them were easily broken. So it was a natural result that the coming of the English, much encouraged by the Indians themselves, was made easy and their settlement on the Connecticut lands greatly assisted. We have seen that the adventurous forerunners were kindly received, and on one or two occasions owed their lives to the friendly shelter of an Indian wigwam; and during the destructive winter of 1635-6, the snow-bound settlers were kept alive by Indian gifts of "malt, acorns and grains." It was not an unusual thing in the colonial settlements for colonists and Indians to live peacefully side by side, pursuing agriculture or trade, or both. Of the early Connecticut adventurers, Holmes is the only one mentioned as purchasing land, and with him, as already shown, the circumstances were exceptional. Oldham and his companions undoubtedly made some bargain, probably of the nature of a joint occupation, and it is very likely that the same was true of the other early settlers before 1636, though one Phelps of Windsor appears to have obtained a deed of Indian land some time in 1635.<sup>1</sup> The indefinite nature of the transaction, and the later confirmation or repurchase of lands, would show that the Indians failed to comprehend the nature of what they were doing; and it may be that what the colonists understood as sale without any reserved rights, the Indian considered as a grant to the whites of the privilege of joint occupancy of the terri-

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<sup>1</sup> Stiles, *Hist. of Windsor*, p. 105.

tory. For many years certain rights in wood and river were conceded to the Indians, and a kind of common law of this nature grew up in some quarters which would point to the recognition of the Indians as possessing some rights in their old possessions, which were sometimes expressly mentioned in their deeds, though they very soon faded away. The land was to the Indians worthless so long as they were in danger of losing it altogether, and the presence of the English meant protection. It was not sharp treatment, but a rough friendliness which led to the ready sale of the valley lands;<sup>1</sup> possibly a legitimate pressure was brought to bear in case of unwillingness, but more probably the unsettled state of affairs and the domination of the Pequots softened any savage obstinacy. As to moral title the colonists could have no better, and the question of original grant has here hardly a place; they purchased of the ancient and original natives, and not of the Pequots, as did the Dutch. It made no difference to the men who watched the Indian make his rude mark of transfer that the historian two hundred years later was to pick flaws in his right to purchase at all, though in English law there was no title until the confirmation of the lands by the charter. Every acre of Wethersfield, Hartford and Windsor territory was honestly obtained. There was no excess of generosity, and for colonists who struggled through hard winters and saw their cattle die by the hundred-pounds worth, there was no opportunity to be generous. But the faded old deeds in the land records, with their strange signature marks, testify at least to a hardy honesty of purpose.

The first to bargain for land had been the Dutch, who, in the name of the West India Company, purchased of the Pequot sachem land whereon they constructed their fort.

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<sup>1</sup> This note in the Windsor Land Records is suggestive: "Coggerynasset testifies that the land on the east side of the Great River, between Scantic and Namareck, was Nassacowen's, and Nassacowen was so taken in love with the coming of the English that he gave it to them for some small matter." Stiles, Windsor, p. 111-112.

The extent of the first purchase is doubtful. Later it consisted of about twenty-six acres, and was, in 1653, seized by the English, and the Dutch driven out forever.<sup>1</sup> After the Dutch bargain came that of Captain Holmes, who, for a valuable consideration, obtained possession of a large tract a few miles up the river, a large part of which was transferred to the Dorchester settlers in 1637. This tract was confirmed to the town of Windsor sixty-seven years later, for a parcel of trucking cloth. The first formal purchase of Hartford territory was made after the arrival of the Hookerites, when a deed was obtained for the whole of the old Hartford township, on the west side of the river. This was paid for by subscriptions to a common fund, and each received his proportion in the later division according to the amount put in. The same year the Wethersfield tract was purchased, perhaps by an oral agreement, and the immediate territory of the three towns became thus firmly established in the hands of the whites. Extensions were, however, obtained on both sides of the river until 1680. Private purchases were made with the consent of the court and town, and gifts from the Indian sachems always required the sanction of the town, in town meeting, where a vote was passed declaring that the grantees and their heirs could enjoy such lands forever. In 1663, however, the court forbade any negotiation with the Indians for land, except it be for the use of the colony or for the benefit of some town.

The law of supply and demand regulated the nature of the exchange. The Indians had at their disposal meadows and hillsides, trees, woods, brooks and rivers, while the colonists had money and goods. The purchase money took the form of so many pounds sterling, so many fathoms of wampum, so many yards of trucking or trading cloth, so many pairs of shoes. There does not appear in Connecticut that variety found in New Haven and elsewhere. Clothing was in great

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<sup>1</sup> Hart. Book of Distrib., pp. 133, 550 ; Stuart, Hartford in the Olden Time, ch. 24.

demand, and twenty cloth coats are recorded for payment of lands across the river, together with fifteen fathoms of wampum.<sup>1</sup> Small parcels of land were obtained in Windsor in return for fines paid in rescuing unfortunate aborigines from the Hartford lock-up<sup>2</sup> and for other services rendered. It is likely that wampum, which was legal tender in New England from 1627 to 1661, was often the medium of exchange; money or wampum was more available than coats, for it was divisible. Twenty coats could cover twenty men, but not women and children; but so many fathoms of shell-cylinders, deftly pierced and strung on animal tendons, could be divided among the family group or a number of grantors. The boundaries of these purchases were generally undetermined and their extent loosely expressed. Oftentimes natural boundaries were such that the location of the purchase can be approximately fixed. These were stated as lying north and south between fixed points on the river, and as running so many miles inland. Such a description would allow of accurate measurement, but when the distance inland was "one day's walk," there might be a difference of opinion as to who should be the surveyor. Often in case of small sales the tract is described as of so many acres adjoining certain bounds or swamps, or other well-known and fixed localities. It was the hazy outlines of the Indian purchases which gave so much trouble to town and colony in the after-settlement of township bounds. In both Hartford and Windsor there were Indian reservations<sup>3</sup> and villages within which the natives were obliged to live, but they proved rather troublesome neighbors, and there was a constant friction between

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<sup>1</sup> Stiles, Windsor, pp. 110-111.

<sup>2</sup> *Ib.* p. 108. This was not an uncommon occurrence; the circumstances attending the purchase of Massaco (Simsbury) were similar (*Mem. Hist.* II, pp. 341-2), and the red brethren were bought out of the New Haven jail in like fashion (*Levermore, Republic of New Haven*, p. 173).

<sup>3</sup> *Wind. Rec.*, Dec. 10, 1654; *Hart. Rec.*, Mar. 15, 1654; June 15, 1658.



the court and the Indians until their final disappearance. The lands of the reservations came, before 1660, into the possession in Hartford of the town, and in Windsor of a private individual. This reservation of land was a prototype of our national Indian policy, and was employed in many of the colonies.

#### GRANTS BY THE GENERAL COURT.

Before 1639, each set of proprietors by itself purchased land of the Indians, and agreed on the boundaries between the plantations through their representatives. But after 1639, all unoccupied territory became public domain and was subject to the control of the colony. This power was granted in the Fundamental Articles, where the people gave to the General Court the right "to dispose of lands undisposed of to several towns or persons." After this, the growing towns had to apply to the central authority for power to extend their boundaries. Thus it happened in 1640 that the towns petitioned the General Court for an increase of territory, and a committee was appointed for examining certain lands suitable for this purpose.<sup>1</sup> The court had already taken measures toward the maintenance of their rights by recent conquest of the Pequot territory, which, by the treaty of 1638, came into their possession.<sup>2</sup>

The central authority was by no means prodigal with its lands, nor yet were they given grudgingly. It was recognized as a far better condition that the lands be in the hands of enterprising men or communities undergoing improvement than that they remain untilled. But though grants were not made at hap-hazard, yet the colony managed to dispose of about thirteen thousand acres within the first thirty years, in amounts varying from forty to fifteen hundred acres. Careful discrimination was made as to the nature of the lands given, and many a grant was specially stated to

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<sup>1</sup> Col. Rec. I, p. 42.

<sup>2</sup> Col. Rec. I, p. 32.

contain only a certain proportion of meadow, usually one-sixth or one-eighth, and at times no upland was allowed to be taken. The islands at the disposal of the court were first given out, and divisions of the Pequot country followed. It was expected that the grantees would at once or within an allotted time undertake the improvement of their grant, either by cultivation or by the establishment of some industry. Neglect to do so generally called forth a reprimand.

Grants made gratuitously were to the leading men of the colony, although they did not at times hesitate to send in petitions. The latter was in general the more common method, and the petition was based on service rendered to the colony, either in a civil or military capacity. It is not always easy to assign causes for grants, but it is safe to say that where no cause is assigned the grantee will be found to be of some prominence in the colony. The pensioning of soldiers who fought in the Pequot war was by means of land grants. After giving out to these soldiers about fifteen hundred acres, an order was passed in 1671 to the effect that, "being often moved for grants of land by those who were Pequitt soldiers, [the court] doe now see cause to resolve that the next court they will finish the matter and afterwards give no further audience to such motions,"<sup>1</sup> after which summary disposal of pension claims, about a thousand acres more were granted and the matter finished.<sup>2</sup> Land grants were required to be so taken up as not to injure any plantation or previous grant; as

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<sup>1</sup> Col. Rec. II, p. 150.

<sup>2</sup> This prototype of our modern pension claims is full of interest. Not only did the colony reward its soldiers for honest service, but the towns did also. The Soldier's Field mentioned in the Hartford Records was so called because therein the Hartford soldiers who fought in the Pequot war received grants. (See paper by F. H. Parker on "The Soldier's Field," in Supplement to *Hartford Weekly Courant*, June 18, 1887.) Windsor also gave a large plot of land to each of her soldiers serving in this war. (Stiles, Windsor, p. 41; see also p. 201 for petition for land after King Philip's war.) Norwalk rewarded her soldiers who fought against King Philip after this manner; to those who served in the "direful swamp fight" of 1676 were

one entry puts it, "provided it doe not damnify the Indian nor the plantation of New London nor any farm now laid out."<sup>1</sup> Sites which appeared suitable for new settlements were reserved for that special purpose.

In Connecticut it was more frequently the rule that no definite location was assigned. The grantee might take his land wherever he could find it; or, in case of equally favored localities, he could choose that which he preferred, always under the conditions already named. In this particular there was far greater freedom than in Massachusetts. As the colony was not always sure of the extent of its territory—for its boundaries at this time were very unsettled—there was occasionally added in a grant, "so far as it is within their power to make the aforesaid grant,"<sup>2</sup> and in another, "where he can find it within Connecticut liberties."<sup>3</sup> A committee was generally appointed to lay out the grant, which, when made to a particular person, must be taken up in one piece, "in a comely form,"<sup>4</sup> unless it was otherwise provided by special

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given twelve acres within the town bounds; to those who served "in the next considerable service," eight acres, and to those "in the next considerable service," four acres (Hall's Norwalk, p. 63). Saybrook also voted that "The soldiers that went out of town in the Indian war shall have five acres apiece of land." (Saybrook Records, 1678.) Following the system inaugurated by town and colony, the Continental Congress in 1776 passed the following resolution: "That Congress make provision for granting lands, in the following proportions: to the officers and soldiers who shall engage in the service and continue therein to the close of the war or until discharged by Congress, and to the representatives of such officers and soldiers as shall be slain by the enemy." The proportions were as follows: Colonel, 500 acres; lieutenant-colonel, 450 acres; major, 400 acres; captain, 300 acres; lieutenant, 200 acres; ensign, 150 acres; each non-commissioned officer and soldier, 100 acres. In 1787, for the satisfying of claims based on this resolution, Congress set apart a million acres of land in Ohio and another large tract covering the southern portion of Illinois, bounded by the Ohio, Mississippi, Kankaskia, Little Wabash and Wabash rivers. (Journals of Congress, I, p. 476; IV, p. 801.)

<sup>1</sup> Col. Rec. I, p. 340.

<sup>2</sup> Col. Rec. I, p. 282.

<sup>3</sup> Col. Rec. I, p. 372.

<sup>4</sup> Col. Rec. II, p. 200.

permission of the court. The committee was usually paid by the grantee. In case a grant conflicted with the lands of a township, the right of the township was always maintained and the granted land was laid out in some other quarter.<sup>1</sup> In two cases lands within town boundaries were granted by the General Court, though these are evidently irregular and isolated instances.<sup>2</sup> Industries were fostered and land was granted by the colony, as was also done by the towns, for their encouragement. John Winthrop was subsidized for his saw-mill and his fishery at Fisher's Island, and John Griffen for making tar and pitch.<sup>3</sup>

The General Court took care to see that not only the individual grants were accurately bounded, but that each township should be distinctly separated from its neighboring townships. Of course in the early days there were a number of isolated plantations, yet in these cases the length of the boundary line was fixed in miles. The extension of the boundary lines of a plantation was equivalent to a grant of land to that community, and was very frequently, in fact one may safely say invariably, made for the first fifty years. In 1673 the boundaries of Wethersfield, Hartford and Windsor were extended five miles eastward on the east side of the river, "for the encouragement of the people to plant there,"<sup>4</sup> and in 1671 the bounds of Windsor were extended two miles northward.<sup>5</sup> A few years after, eight inhabitants of Wethersfield petitioned the court for a town grant of ten square miles, with the usual privileges and encouragements, for the purpose of erecting a plantation.<sup>6</sup> This method was not so common in

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<sup>1</sup> Col. Rec. I, pp. 208, 221, 230.

<sup>2</sup> Col. Rec. I, pp. 63, 393. In the latter case the grantee paid for the land to the court.

<sup>3</sup> Col. Rec. I, pp. 64-5, 410. There is a collection of legislative acts for the encouragement of Connecticut industries in the Report of the Bureau of Labor Statistics for 1887, pp. 47 ff.

<sup>4</sup> Col. Rec. II, pp. 185, 187.

<sup>5</sup> Col. Rec. II, p. 155.

<sup>6</sup> Col. Rec. III, 99.



Connecticut as in Massachusetts, where by far the greater part of the land disposed of was granted to communities of settlers.<sup>1</sup> The rule was early made<sup>2</sup> in Connecticut, as also in the other colonies, that neither town nor individual should purchase from the Indians without the sanction of the court; this was enforced<sup>3</sup> both for the protection of the Indians and for the maintenance of the dignity of the court.

In 1666, counties were established, and four years afterwards the General Court gave to each six hundred acres for the support of a grammar school,<sup>4</sup> although the school-teacher himself does not appear to have been assisted as was the case in Massachusetts.<sup>5</sup> By 1674 the colony probably felt that she had rewarded her servants, provided for her towns and schools, and might, herself, reap some benefits from her lands, for we find in that year a committee appointed to examine and dispose of certain public tracts at the best price;<sup>6</sup> this did not mean, however, a cessation of private grants from the public domain.

A word must be said regarding the patent which was given to each town in 1686 for the better securing of its lands. This was at the time of the Andros government. Not only were the lands actually occupied by the towns included in the patent, but also large tracts of public lands within the jurisdiction of Connecticut, to prevent their falling into the hands of Andros. These were granted in free and common socage.<sup>7</sup> To Wethersfield, Middletown, and Farmington a large tract in their immediate vicinity was given, and they were enjoined to erect thereon plantations.<sup>8</sup> To Hartford and Windsor was

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<sup>1</sup> Egleston, *Land System of N. E. Colonies*, J. H. U. Studies, IV, p. 571.

<sup>2</sup> Before 1650, *Col. Rec. I*, pp. 214, 402.

<sup>3</sup> *Col. Rec. I*, pp. 418, 420.

<sup>4</sup> *Col. Rec. II*, p. 176.

<sup>5</sup> *Mass. Col. Rec. I*, p. 262.

<sup>6</sup> *Col. Rec. II*, p. 231.

<sup>7</sup> "Not in capite nor by knight service." This is a curious retention of a formula, for feudal tenures were abolished in England in 1661.

<sup>8</sup> *Col. Rec. III*, p. 225.

given nearly the whole of the present Litchfield County. In the latter case, after the downfall of the Andros rule, the colony tried to recover the tract of patented land, but the towns clung firmly to what they claimed as their rights, and in 1715 took measures for the proper disposal of the land and the laying out of one or two towns therein. These towns claimed the right contained in the grant of the General Court to give full and ample title to any purchaser,<sup>1</sup> and had two years before taken possession of this tract in good old Teutonic fashion by turf and twig.<sup>2</sup> They now appointed a committee to act as real estate agents for the town. A compromise was afterwards effected. The tract in which they hoped in 1715 to lay out two or three towns now contains nearly twenty-five.

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<sup>1</sup> Col. Rec. III, p. 177-8; Hart. Town Rec., March 3, 1714-15.

<sup>2</sup> Wind. Rec., Dec. 23, 1713. This method of taking possession was formally required by English law. Its origin antedates the use of written documents; a twig broken or a sod cut symbolized the transfer. The later written deed simply took the place of the living witnesses required by the old form; the ceremony continued until a late date. Two quotations will suffice. "Voted that two of said committee shall go and enter upon said propriety and take possession thereof by Turf and Twigg, fence and enclose a piece of the same, break up and sow grain thereon within the enclosure, and that they do said service in right of all the proprietors, and take witness of their doings in writing, under the witness hands." (East Hart. Rec., Goodwin's East Hartford, p. 150.) The second quotation illustrates the transfer of land. Two inhabitants on deposition testify, "as we were going from Hartford to Wethersfield, Jeremy Adams overtook us and desired that we would step aside and take notice of his giving possession of a parcell of land to Zachary Sandford, which we did, and it was a parcell of land . . . on the road that goeth to Wethersfield, and we did see Jeremy Adams deliver by Turf and Twigg all the right, title and interest that he hath or ever hath of the whole parcell of land to Zachary Sandford." (Hart. Book of Distrib., p. 399.) See also Col. Rec. III, 305. The same custom was in use in other colonies. H. B. Adams, *Village Communities of Cape Ann and Salem*, J. H. U. Studies, I, p. 398. Bozman, *Maryland*, II, p. 372, note. "Gleaner's" Articles, Boston, Rec. Comm., vol. V, p. 117.

## EARLY TOWN ALLOTMENTS.

The system of land allotments was not essentially different from that which was in vogue in the Massachusetts towns. The nature of the settlement was different, and in consequence there was probably less order and symmetry in the apportionments. One can almost trace out the story of the settlement from the nomenclature of the Town Votes and Land Records. Wethersfield has her "adventure lands" and her town originally of two distinct parts, with the meeting house square between, betokening an earlier and latter infusion of settlers. Hartford has recorded the "Indian's land," "Dutch Point," and "Venturer's Field" as existing before the coming of Hooker, and Windsor has references to "Plymouth Meadow," and to the "Servants" (Stiles party) who preceded the Dorchester emigrants. The lands seized by these early comers were in advantageous positions, and their occupation was recognized as entailing a legal right to the lands.

The adventure lands of Wethersfield<sup>1</sup> form one of the most fruitful plateaus in the present township; a triangular-shaped plain of splendid arable, out of reach of freshets and capable of high cultivation. This plain was closed in on each side by the Wet Swamp and Beaver Brook, which water-drugged courses gradually drawing closer together met at what was called the "Damms," a division of land half spur and half swampy meadow caused by the artificial damming of the stream by the beavers. Parcels of ten, twenty and seventy acres are found in the Records, adjoining each other on this plateau, and forming the largest open tract in the immediate eastern vicinity of the lower part of the town. As other settlers appeared, they occupied lands taken up somewhat in the order of their arrival. The home-lots were divided originally into two communities, the earlier of whom settled on

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<sup>1</sup> The writer has made a detailed study of the system of early allotments of one town, Wethersfield, as can only be learned from her book of Land Records.

lands adjoining those of the Adventurers, the other farther to the north took advantage of the neighboring water facilities and the convenience of the harbor. The home-lots were of nearly the same size in the majority of cases, about three acres, nowhere less than two, and only exceptionally six, ten, thirteen, and eighteen.<sup>1</sup> It is likely that in the larger homesteads a sale had taken place, not recorded, and the accumulation of property thus early begun. Uniformity is the rule, and shows that whether in a general meeting of the proprietors or otherwise, a certain system was agreed upon. The lay of the village streets marks the double settlement, although the two parties at once united in the division of lands. The system of the New England colonies shows unmistakable traces of the influence of the mother country, yet only in its general bearings and principle of commonage does it have any direct resemblance to the early English or early German tenure. In its direct apportionment of small shares of all kinds of land to each inhabitant, to his heirs and assigns forever, the system is *sui generis*, though in its more general aspect of arable, common and waste land it is similar to the older form. Every New England village divided the lands adjacent to the town, the arable and meadow, into large fields, according to their location and value, and then slowly as there was need subdivided these fields in severalty to the proprietors, according to some basis of allotment. Means of access, or "ways," were cut into or through the fields, answering to the headlands in the Saxon arable, and these, with the more dignified but not necessarily more passable "highways," formed sufficient boundaries to and division lines between the different parts of the meadow. Apparently every new-comer who became an inhabitant either

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<sup>1</sup> In Watertown, whence so many of the settlers came, the recorded home-lots varied in size from one acre to sixteen, with an average of five or six acres. (Bond, Watertown, p. 1021.) Yet one is not sure that this represents the original allotment, for in Hadley, settled partly from Wethersfield in 1659, the size of every home-lot was eight acres, and church members and freemen had no advantage over others in the distribution of lands, a fact which was almost universally true. (Judd's Hadley, p. 33.)



purchased or was given a share in the lands of the town ; not, indeed, a lot in every field, for the old fields would soon be filled up, but in the new fields, which, opened or "wayed" off in advance, were a ready source of supply. Certain sets of men held their lands almost exclusively in certain fields, having no part in the division of other inferior fields, which appear to have been assigned to late comers, who evidently came to the settlement in parties of three or four or a dozen at a time. Human nature is much the same the world over, and there are clear traces of an ancient and honorable class, even in the infant community. They held the best lands and had the largest shares undoubtedly because they contributed the largest part of the purchase money. So far as practicable, lands were held in the neighborhood of the home-lot, from obvious reasons. This is chiefly true of early comers, though by no means a fixed rule. Besides the artificial bounding of the large fields by "ways," natural boundaries, as river and mountain, were largely employed, and the names given to these fields at once disclose their location or some superficial or other characteristic.<sup>1</sup> The individual plats are simply described as bounded by highway or river, meadow, fence or water-course, and by the adjoining lot of a neighbor. The shape of the lots was generally that of a parallelogram, though here again no certain rule obtained. We find the "Triangle," "Jacob's Ladder," and a variety of other geometric forms, but the rectangle is the custom. In a number of the fields laid out<sup>2</sup> we notice a certain regularity which betokens design. The field was divided into two parts

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<sup>1</sup> The following are some of the Wethersfield names: Great Meadow, Wet Swamp, Dry Swamp, Long Row in Dry Swamp, Great Plain, Little Plain, East Field, Middle Field, West Field, Little West Field, Great West Field, Furtherest West Field, South Fields, Beaver Meadow, The Dams, Back Lots, Pennywise, Mile Meadow, The Island, Hog Meadow, Huckleberry Hill, Ferne Hill, Fearful Swamp, Hang Dog Swamp, Sleepy Meadow, Cow Plain.

<sup>2</sup> South Fields, Fields in Mile Meadow, The Island, and Middle Row in Dry Swamp.

lengthwise, and the order of holders in one tier would be reversed in the other, thus making the distribution more equal. Often clusters of the same holders are found, two or three together, holding the same relative position to each other in different fields, which seems to show that these must have received their allotments at about the same time, each taking holdings in several adjacent fields. In two<sup>1</sup> of the large divisions a curious arrangement prevailed. Each field was a parallelogram divided crosswise into sections. The holder of the first section next the highway on the east also held the last section, of exactly the same size, next the wilderness on the west. Section-holder number two from the highway owned also the second section from the wilderness, and so on, each holder having two lots in this tier, symmetrically placed and of equal size, the holder of the middle section of course owning one large lot, because his two sections would lie adjoining each other. The system of tiers or ranges in formal divisions was universally employed in Massachusetts and Connecticut, but finds no analogy on the other side of the water, although the method of assigning these lots by chance, in the drawing of numbers or some similar procedure, is as old as the cultivation of the arable itself. In these early allotments the Church comes in for its share. In fact, it was a fixed principle in the working out of the land system to consider the Church as a very important personage, and assign to it lands accordingly. Its portions were considerably larger than the average, and were scattered about in nearly every one of the large fields. These allotments are generally titled "Church lands," "Church lotts," or at the "Churches disperse." Such lands were not taxable, and many of them were held until a late day, not being alienable. The terms of the grant of church or parsonage land are iron-clad: "to remain and continue to the use of the ministry, by way of a parsonage, forever,"<sup>2</sup> or other conditions similarly

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<sup>1</sup> Little and Furtherest West Field.

<sup>2</sup> Weth. Town Rec., March 23, 1666.

binding. But Yankee ingenuity has effected a lease of many of these lands for 999 years, thus obviating a difficulty, though any improvements made upon them changing their condition as church property were, by decision of the court, taxable.

As might have been expected, a great deal of the land was "ungiven" in the year 1640, even within the fields already described. Amongst the homesteads also we find plots reserved by the town as house lots, and the lands ungiven within the more distant fields must have been of considerable amount. Some of the older fields do not appear to have been entirely divided up for forty years.<sup>1</sup> The divided fields were bounded by the ungiven lands, lands not laid out, and the wilderness.

In the mind of the court, the land rights of the three towns must have become by 1639 somewhat confused, for in that year it ordered each town to provide for the recording of every man's house and land, already granted and measured out to him, with the bounds and quantity of the same.<sup>2</sup> As a result of this order, there exist those valuable books of distribution, upon whose records all maps of the river towns are based. In consequence of the fact that four years elapsed before record was made, the standard of apportionment can only be approximately determined. The business activity of the little colony in real estate must have been great during this period. There were numerous withdrawals from and occasional accessions to the number of inhabitants, which would occasion a considerable distortion of any original system. It is safe to say that to each homestead there belonged proportional rights in the upland,<sup>3</sup> and in some cases

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<sup>1</sup> Allotments were assigned in Mile Meadow as late as 1680; in Great Meadow, 1680; in Dry Swamp, 1654; Wet Swamp, 1673.

<sup>2</sup> Col. Rec. I, p. 37. Massachusetts in 1637 had the same trouble, "That some course be taken to cause men to record their lands, or to fine them for their neglect." Mass. Col. Rec. I, 201.

<sup>3</sup> Col. Rec. I, p. 63.

the possession of a home-lot carried with it rights in every division.<sup>1</sup>

By 1640 many of these rights had been sold to men within the colony, and because many of the divisions were already full we find different sets of owners in the different fields. There are certain traces remaining of a proportion between certain of the house lots and the meadow lots. Ratios of two to one, three to one, are visible. In the apportioning of the large fields there is more evidence of design, because consummated at a later period, and thus subject to fewer transfers or sales. Between the lots in the Meadow, Great West Field, and Naubuc Farms we note such proportions as 14-42-84, 13-39-78, 17-51-102, 19-57-195, 16-48-144, 45-135; but we also find as many exceptions to the rule which the above evidence might seem to offer, as there are conformities to it. In which cases we can say that there has been a deviation from an original rule through property accumulation. The fact that in all later apportionments some basis of division was regularly employed, points to a similar custom before 1640. It is possible to draw the conclusion based on slender, yet suggestive facts, that allotments in the homesteads were made as nearly equal as possible, only varying in size because of adventitious causes, such as size of family, wealth, position, influence, etc.; that allotments in the Great Meadow were based on the right of each in the purchase land according to his contribution; that in the Great West Field there was employed a three-fold allotment based on the former division; and in the Naubuc Farms division, there was used a two-fold allotment based on the Great West Field.<sup>2</sup>

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<sup>1</sup> Col. Rec. I, p. 445. "Rachel Brundish hath 14 acres of meadow, her house lott 3 acres, and what upland belongs thereunto in every divysion, savinge what her husband and she hath sold, vizt. her shaire beyond the River and 6 acres in Pennywise."

<sup>2</sup> See below, p. 55, n. 2.



## INDIVIDUAL GRANTS.

Many of the grants already described were individual, but of a somewhat different nature from those of which we have mention in the Town Votes. Before 1640 the town was supplying itself with land, after 1640 it began to supply newcomers. In order to properly understand the situation we must know something about that town oligarchy, the proprietors. They were the body of men who owned the land, who had a dual character as proprietors and as inhabitants; this is recognized in the phrase frequent in the records, proprietors-inhabitants. Herein the three towns present decided differences. In Hartford, while many grants were made by the town in town meeting, yet much was done in proprietors' meeting, and general divisions in but one or two cases were made there also. In Windsor, on the other hand, no grants were made in town meeting except for encouragement of trade, and then such lands were given from the distinctly town lands, as town commons, town farm, town orchard; all was apparently done by the proprietors. But in Wethersfield the town and proprietors were practically one, and all grants, as well as all general divisions, were made in town meeting. The latter case is then specially worthy of examination. The earliest division of lands was between thirty-four men, who claimed, as the number of inhabitants increased, their original right. In 1640, after the order of the General Court giving towns power to dispose of their own lands, and before the recording of lands was completed, an agreement was made between these thirty-four men and the Town and Church, by which they were given an equal share in the lands to be divided, whether to be held as common land or in severalty.<sup>1</sup> This may have given to the Wethersfield system of grants its peculiarly town character. The proprietors' right to the ungiven lands was generally held in abeyance, and practically the town held the privilege of granting lands

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<sup>1</sup> Col. Rec. I, p. 63.

at her pleasure. Two facts are, however, to be noticed ; first, that the proprietors or their descendants held—when they cared to exercise it—the balance of power in town meeting ; and second, that in case of mismanagement, the proprietors exercised their right and it was recognized by the town. Yet in the granting of single lots to new-comers, the proprietors allowed them to be given by the town in the name of the town in town meeting.

For many years after the early allotments no general apportionment of lands was made except in the shape of single grants by the town to private individuals, according to phrases in the records, “which was given by the Church and Town,” “which was given him by the Church,” “which was given him by the Town.”<sup>1</sup> The grant was either gratuitous or by request, more frequently the former. Often the amount is not stated in the vote, and when given, rarely exceeded twenty acres. House lots were given as well,<sup>2</sup> and in the case of gratuitous grants, the desire of the receiver must have been in some way expressed, personally or through his neighbors. The town as well as the State encouraged industries and looked out carefully for all undertakings which promised benefit or advancement. To any one of good character and acceptable to the town, land was granted in very liberal quantities and with considerable liberty in the selection. The grant was almost invariably accompanied by conditions, as in the case of a grant to Governor Winthrop for a mill ; “if the said hon<sup>r</sup> Gov<sup>r</sup> Winthrop doe build mill or mills according to his proposition made to the town, that then this grant to be confirmed and settled upon the said Winthrop and his heirs forever, or else to be void and of none effect.”<sup>3</sup> Governor Winthrop failed to comply

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<sup>1</sup> Weth. Rec., Dec. 28, 1649 ; Jan. 25, 1652, and Land Records, vol. I, *passim*, under date 1640–41.

<sup>2</sup> House lots were often taken directly out of the highway when the width allowed.

<sup>3</sup> Weth. Rec., June 3, 1661.

with the condition, forfeited the land, and it was regranted six years later.<sup>1</sup> But grants for the support of industries (and these and grants for recompense are the only ones found in the Windsor Town Records) were not alone subject to conditions. The principle that granted lands must be improved or built upon was adopted by Hartford as early as 1635, when twelve months was made the limit, the town at the same time reserving the right of necessary highway through any man's land.<sup>2</sup> This rule was relaxed in favor of prominent individuals, sometimes by an extension of the time limit, and sometimes by an entire freedom from the condition.<sup>3</sup> In case of forfeit, the grantee was generally paid the full value of expended labor. As it was a bad policy to observe too tenaciously conditions which would discourage inhabitancy, the town seems to have enforced the forfeiture and then to have avoided bad results by a technical subterfuge; the same piece of land was regranted, or a new lot was given in another quarter.<sup>4</sup>

Another condition provided for in the case of freed servants or repentant sinners was the voiding of the grant in case of sale or alienation. This was to prevent imposition in case of doubtful characters, whose efforts toward uprightness the town wished to encourage. A kind of police regulation is embraced in one condition, best explained by quotation. Thirty acres were given to John Stedman on the town frontier next the common, "on the considerations following, viz. that the said Sjt. John Stedman shall secure, preserve, and defend the timber, fire-wood, and stone belonging to this town from all intruders thereon, especially from the inhabitants of Hartford, . . . and on his failing of the considerations mentioned, he is to

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<sup>1</sup> Weth. Rec., Nov. 4, 1667.

<sup>2</sup> Hart. Rec. 1635, I, p. 11.

<sup>3</sup> Hart. Rec., Jan. 14, 1639.

<sup>4</sup> "Mr. Alcott's house lot being forfeited is taken into the town's hands until the next general meeting, who will either let him have that again or give him answer in some other kind." Hart. Rec., Jan. 10, 1639, I, p. 115.

forfeit his said grant.”<sup>1</sup> Indeed, conditions were by 1650 such a matter of course, that one vote, covering some half a dozen grants, made them all conditionary in one breath. “All these men had their lands given them by the town upon the same conditions, which men had and was formerly tied to and bound to.”<sup>2</sup> Failure to carry out these conditions, as already said, rendered the grant void, and the land reverted to the town. Often, instead of a distinct allotment of new land, the grant took the shape of an enlargement or extension of land already owned. Here no condition was required, as the grantee was already well known and his reputation established. Two other varieties of land allowance need to be mentioned, which would not increase the number of holdings in severalty, as would be the case with those already discussed—the grant of an equivalent elsewhere when land of an inhabitant was taken for street or highway,<sup>3</sup> or unintentional injury had been made by a later grant; and the giving of a portion to some needy person, generally of only an acre or two, to improve for a short time rent free, on condition that the fence be maintained.<sup>4</sup> Rent, when charged, was small—ten shillings per acre.<sup>5</sup> The laying out of all the above grants was done by the townsmen or a committee selected for the purpose, and it was not infrequent that questions of amount and location were left entirely to the discretion of the committee.<sup>6</sup>

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<sup>1</sup> Weth. Rec., January 3, 1686. There is something curiously similar in this instance to the position of the lands of the Saxon *haward*, who was given his lands along the border of the manor, so that, in case of damage by loose animals, his own lands would first suffer. The town fathers evidently appreciated the fact that Sjt. Stedman, holding land where he did, would keep a more careful lookout.

<sup>2</sup> Weth. Rec., Dec. 28, 1649.

<sup>3</sup> Hart. Rec., Jan. 6, 1651.

<sup>4</sup> Hart. Rec., Feb. 3, 1668.

<sup>5</sup> Wind. Rec., Feb. 4, 1684.

<sup>6</sup> The granting of a lot was, of course, confined to inhabitants who were new-comers, and who are to be distinguished from the proprietors. Hartford has a list of “the names of inhabitation as were granted lotts to



Although from the absence of record we have said that the later Windsor grants were made by the proprietors, yet we know that the earliest allotments were made by the "Plantation."<sup>1</sup> The Hartford proprietors were an important body, but were satisfied to let the town shoulder the burden of making individual grants, while they kept in their own hands general divisions. The Wethersfield proprietors were dormant, not dead.<sup>2</sup> Their meetings were fused with those of the town, and troubles arose frequently between the established few who paid the greater part of the taxes, and the new-comers or less important inhabitants.<sup>3</sup> The former asserted their previous rights in the

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have only at the Townes Courtesie, with liberty to fetch wood and keep swine or cows by proportion on the common." (Book of Distr., p. 550.) The privileges of granted lands were generally confined to the owner. Hartford early passed a vote denying the privilege of felling trees on granted land to any except the owner. (Hart. Rec., Dec. 23, 1639.) In Windsor all granted lands were considered free for the inhabitants to use for the obtaining of wood, timber and stones until they were enclosed. (Wind. Rec., Feb. 4, 1684.) An act like this was intended to offset the monopoly of the proprietors, and to hasten occupation and cultivation. Two years after Windsor extended the privilege of every inhabitant for the obtaining of timber, stone, wood, and grass to all unenclosed and undivided lands. (Wind. Rec., Jan. 5, 1686.) On this point, however, see the section Proprietor's Commons.

<sup>1</sup> Wind. Land Rec., vol. I, *passim*.

<sup>2</sup> That the proprietors still lived is evidenced from this vote: "That no land shall be given away to any person by the Town, unless there be legall notice given to all the proprietors before the meeting that is intended by the Selectmen to give away land aforesaid." (Weth. Rec., March 18, 1678-79.) The same factors existed in each of the towns, only differing in the ratio of influence in town affairs. In Wethersfield the town overshadowed the proprietors; in Windsor the proprietors overshadowed the town, while in Hartford the balance was about equally preserved.

<sup>3</sup> Much the same state of things existed among the proprietors of Windsor. There were the historic proprietors who had primordial and inherited rights, and the new class who had purchased rights and held their position by virtue of their money. This led to constant disagreements and factional disputes. The cause of this lack of harmony was the question whether a majority vote was to be decided by counting the number of hands held up, or by reckoning the sum total value of rights thereby represented.

undivided lands, and protested against the indiscriminate giving away of common land, particularly that which lay in the stated commons, streets, and highways, by these less conspicuous taxpayers. The latter, apparently taking advantage of an apathy toward the town meeting, and consequent absence of many of the proprietors, gave away to persons undeserving of the same, the lands belonging, as the protestants claimed, to the proprietors and inhabitants in general. Not only was this very caustic protest entered in the records, but a special vote was passed providing for the proper stirring up of sleepy farmers when town meeting was to be held.<sup>1</sup> The fact of this protest shows that among the townspeople themselves, all undivided lands were considered as belonging to the town, not in its corporate capacity, but as composed of the proprietors and inhabitants of that town, and that indiscriminate alienation of any portions of these lands was a direct infringement on the rights of such inhabitants and proprietors.

The liberal policy pursued by town and proprietor was not sufficient to exhaust all the land in the immediate vicinity. None of the smaller parcels granted were far from the towns, except a few, which formed the partial basis of new villages<sup>2</sup> three or four miles away, often across the river. Therefore a more rapid process was in a few cases effected, and a system of dividing up vacant tracts established. Such tracts were not large, and the number of men interested therein was limited. The principle contained in the gift of such lands was akin to that of the individual grants, while the method of division bore a resemblance to that most prominently employed in the larger divisions. The grantees were always inhabitants already holding land in the township, and the existence of an amount of ungiven land, upland or meadow, favorably situated, would lead to a petition by divers inhabitants for the

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<sup>1</sup> Weth. Rec., Jan. 28, 1697-98.

<sup>2</sup> In this sense were the words town and village used in the Connecticut colony. The town was a political unit, the village was not.

parcelling of it out to them. This petition would be acted upon in town meeting, and a committee appointed to interview the petitioners and fix the basis of allotment. The proportion was usually that which existed already in some divided field or former grant. In one of the earliest instances, seven petitioners were given three acres, and an eighth was made residuary legatee.<sup>1</sup> In another, six inhabitants received all the undivided land in Wet Swamp, and with it the care of what remained unassigned of the common fence.<sup>2</sup> Two years later a large tract of upland was divided in fourfold amounts to those holding allotments in Mile Meadow. The records fail to state the number of partakers, or whether it was done by request or otherwise.<sup>3</sup> In Hartford such a division took place when the land lying in the rear of five home-lots and extending to the river was divided to the owners of these lots, according to the number of acres each had therein.<sup>4</sup>

One interesting case of division is found where the land is allotted according to proportion of meadow fence. This fence was, by order of the town, removed from the lowlands, extended along the top of the hill, and again turned at right angles toward the river. A large grant was made to those removing their fence, and it was proportioned in the following manner: the land was divided by a path into two fields, one 126 rods wide and the other 31 rods wide. To every man there was given in the larger tract one rod's width of land for every three rods which he owned of fence, and in the smaller tract for every eight rods of fence was allotted half a rod's width of land. The allotments therefore ran in narrow strips east and west.<sup>5</sup> This division took place in one of the outlying settlements which afterwards developed into a separate town. Toward the close of the century we begin to find steady encroachment on the generous widths allowed for

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<sup>1</sup> Weth. Rec., March 31, 1660.

<sup>2</sup> Weth. Rec., Feb. 16, 1672.

<sup>3</sup> Weth. Rec., Jan. 1, 1674.

<sup>4</sup> Hart. Rec., Jan. 14, 1683.

<sup>5</sup> Weth. Rec., Nov. 4, 1672; Dec. 25, 1707; April 24, 1713.

highways. This betokens a scarcity in the adjoining fields. It had been previously done in all the towns, for convenience in establishing certain industries near at hand; but later we find private grants taken directly out of the highways and town commons.

#### LATER GENERAL DIVISIONS.

For many years after the settlement, grants of a nature already described, together with the accretions and transferences through alienation or purchase, were sufficient to satisfy the needs of the townspeople. The boundaries between the towns became approximately though not finally determined on, and a steady growth in all directions was taking place; in consequence of which, general divisions began to be called for. We know that many of the earliest allotments had been of the nature of general divisions, and Hartford passed a rule in 1639 voiding any such division made by a part of the inhabitants (proprieters) without the knowledge and consent of the whole,<sup>1</sup> and there is afterwards a reference made to a rule adopted for division of lands of a still earlier date.<sup>2</sup> The earliest division of which we have

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<sup>1</sup> Hart. Rec., Jan. 7, 1639.

<sup>2</sup> Hart. Book of Distr., p. 582, referring to rule of Jan. 3, 1639. What this rule was we cannot say. It may have been the restatement of the rule adopted when the lands were first allotted. We have extant the list of subscriptions to the general fund according to which the settlers were taxed for further purchases and according to which they received land in the early divisions. In this Mr. Haynes is credited with 200 and Richard Risly with 8 shares or pounds, and others with intermediate amounts. As these amounts are not proportionate to the wealth of the persons mentioned, it is likely that the principle of limitation was applied in Hartford, by which no one was allowed to put in more than a certain amount; thus all would be given a fair share in the divided lands and would bear a proportionate share in the burden of future purchases. This principle was probably applied in New Haven (Atwater's New Haven, p. 109; New Haven Col. Rec., vol. I, p. 43), and we know that it was so in Guilford, where the limitation was £500. (Hist. of Guilford from the MSS of Hon. Ralph D. Smith, p. 54.) That such rule of division with possible limitation was in force in each of the river towns we think could be demonstrated.



record was in 1641, when the vote was passed,<sup>1</sup> though its provisions were not fulfilled until 1666. The tier to be divided was on the east side of the river, and was made up of two parts, in the allotting of which the differences in the quality of land were recognized. In the lower of these parts land was given, we might say, at its par value; that is, every one to whom land was given in the southern tier received one acre of land for each pound of right in the undivided lands, or, as the record says, "one hundred for one hundred"; while in the northern half a premium of five per cent was allowed, that is, for every hundred pounds right the proprietor was to have one hundred and five acres. The first allotment was made in a tier of a mile in width, and as the vote provided for a tier of three miles width, the allotments were all trebled.<sup>2</sup> This was properly an extension of the original allotments, for certainly Wethersfield, and probably Windsor, divided the three mile tract in 1640.

Practically the first general division was that of Wethersfield in 1670. Up to this time the whole territory stretching from the West Fields westwards into the unbroken country was known as the Wilderness, and served as a convenient pasture for the masting of swine. Highways had been cut through it by energetic woodsmen and cutters of pipe-staves, by means of which access was had to the lands soon to be laid out. This land lying along the western boundary the inhabitants proceeded in town meeting to lay off in the shape of a tier a mile in breadth, and to divide it up among the "inhabitants, that is to say, to householders, that live on the west side of Conectecot river."<sup>3</sup> The land was divided into seventy-six shares, one share to each householder. The amount of the share was fifty-two acres, and each received an equal amount, "one man as much as another." They were lots in the good old Saxon sense of the word, for the inhabitants cast lots for

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<sup>1</sup> Hart. Rec. I, p. 52.

<sup>2</sup> Hart. Rec., Feb. 18, 1640; Feb. 16, 1665.

<sup>3</sup> Weth. Rec., Feb. 23, 1670.

them; the method is not told us, but he or she (for there were five women among them) who drew lot number one took the first share on the north, number two the next, and so on. One important distinction is at once to be noticed between this grant by the proprietors-inhabitants of land to themselves, and grants of single parcels "by the Towne" to new-comers. In the latter case grants were not necessarily made in fee, many were revoked, but in this case it was expressly stated that the land was to be held by the inhabitant as a proprietor, to be his and his heirs' forever. This emphasizes the view held by the inhabitants regarding the ownership of the undivided lands.

But the growth of the little community soon demanded further division of lands, and a new principle was adopted, much less communistic than the last, which seems to have been based on a "social compact" theory that all men are free and equal and all are to share alike in the distribution of benefits. In 1695 one hundred and sixty-five inhabitants, or their proxy, met for the drawing of lots. Five great tiers were laid out on three sides of the wilderness, and the sharers drew for their position therein, receiving an amount of land proportionate to the tax assessment for 1693, at the rate of half an acre of land for every pound in the list of estate.

In the meantime Hartford had been making a new division, and that, too, along its western boundary. This was done by the proprietors in their own meeting in 1672. The same rule was adopted as had been employed in the earliest divisions. By this time many of the rights had changed hands, but the proportion still remained the same. The basis of division of this tier, which was a mile and a half in breadth, differed so materially from that of about the same date in Wethersfield as to be somewhat striking. Instead of equality we have shares varying from a width of three rods to a width of ninety-one rods, and instead of grants to householders we have a division to original proprietors or their

representatives.<sup>1</sup> The Wethersfield method had a certain advantage, in that a nearly exact division of all the tier could be obtained. In Hartford, however, there was an overplus, and five years later the proprietors took this in hand, and the scheme adopted shows the proprietors in a new rôle which does them credit. This overplus of nearly six hundred acres was laid out in five tiers, running north and south, of which the middle tier was to be divided into twenty-acre lots and the others into ten and fifteen-acre lots, and when this was done, the committee was authorized to "grant these lotts to such of the town of Hartford as they shall see in need of the same, and as they judge it may be advantageous."<sup>2</sup> In point of fact, however, the tiers were divided into much larger lots, and to only thirty-one "needy" persons. Probably the committee put their own construction on the order.

The general division of the Windsor common and undivided lands was long delayed. The first definite proposal to that end was not made until 1720, when a scheme was discussed and voted by the town for laying out and dividing a strip of land running entirely around the township, of a mile in width on the east side of the river and half a mile on the west. But this proposal was met by the protest of the proprietors, and, though the plan continued to be discussed, it was not until 1726 that the two bodies came to an agreement. The town seems to have taken the matter into its own hands, perhaps on account of the wranglings of the proprietors among themselves and the complications which had arisen in their claims. The same trouble resulted from an attempt to divide the Equivalent, a tract of land granted to the Windsor proprietors in 1722 by the colony, to compensate for several thousand acres of their territory which, by the arrangement of the boundary line, had been taken from that town and added to the lands of the Massachusetts colony. As early as 1725 the proprietors voted to divide these 8000 acres to each "pro-

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<sup>1</sup> Hart. Book of Distr., pp. 581-582.

<sup>2</sup> Hart. Book of Distr., p. 584.

prietor Inhabitant, according to the list of Real Estate in the year 1723, viz., such Real Estate as the proprietors hold in their own right.”<sup>1</sup> It was not until 1743 that a sufficient agreement was reached by the conflicting parties to allow the actual division to be consummated. At that time the mile and half-mile tiers were divided into 219 lots, and the Equivalent into 367 lots, the basis of allotment remaining as before, viz. the list of freehold estate. Windsor made up for her lateness of division by her activity when once started, and from this time on her surveyor was kept well employed.

The enactment passed by the General Court establishing the privileges of the proprietors and creating them a quasi-corporation, brought about in the three towns a final division of the common lands about the middle of the eighteenth century. Windsor led off in 1751, giving to each proprietor a lot according to his list, and then finding some land left

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<sup>1</sup> Wind. Propr. Rec., p. 2. The directions given to the committee for division may be of interest :

“1. You are to inspect the list of freehold estate given into the lists in the year 1723, and all lands belonging to orphans set in said List to other persons you are to allow divisions for such lands to the orphans only.

“2dly. Where you have it made evident to you that any person hath put land in that List which he hath purchased and the seller reserved in the time of the purchase his Rights of Division for said Land, in that case you are to allow Divisions for that land to the seller only.

“3dly. You are to lay out the land equally as you can according to the Rule of proportion set by the proprietors in their voat, having Respect to Quantity and Quality.

“4thly. You are to lay out convenient Highways in said Lands according to your best judgment.

“5thly. Where any person in the list of 1723 hath set to him any Lands that he had in Improvement upon the Commons, in that case you are to allow no division for the same.

“6thly. When you have found out the number of the persons that are to receive in the Division, you are to number the Lotts to them, and then cast a lott to determine where each proprietor shall have his lot in the Teare of Lotts in the Division.”—Wind. Propr. Rec., pp. 2-3. Similar rules were adopted in most of the divisions made in each of the towns at this time. Regarding the history of the Equivalent, see Stiles. Hist. of Windsor, pp. 260-263.



over, the committee proceeded to "lay to each Proprietor a small lot" in addition.<sup>1</sup> These small lots were from half an acre to six acres in size. Wethersfield followed in 1752, and there we find an unexpected show of legal formula and red-tapeism. The proprietors sat in solemn council and decided to divide. Strengthened by the decree of the General Court, they passed the customary restrictions and limitations in connection with orphans and landlords. Nine months afterwards did the town, quite in submissive contrast to its former votes, establish, ratify and confirm the action of the proprietors.<sup>2</sup> Hartford proprietors two years afterwards did the same, with the same ratification from the town, with, however, an explanatory clause which is worth quoting. "To divide a certain large tract . . . which tract the Inhabitants have quietly held as their own, enjoyed and improved from Time beyond the memory of man, and whereas the Inhabitants being now sensible of great difficulty and contention that is likely to arise with regard to the claims and pretensions of sundry persons claiming in opposition to the method of division agreed upon, and the inhabitants being now very sensible that no division can be made more for the peace and good will of all concerned than that agreed upon, vote that they grant and confirm unto the afores<sup>d</sup> Proprietors, all the afores<sup>d</sup> Common Lands in proportion as is stated in said list for them and their heirs forever."<sup>3</sup> The method agreed upon

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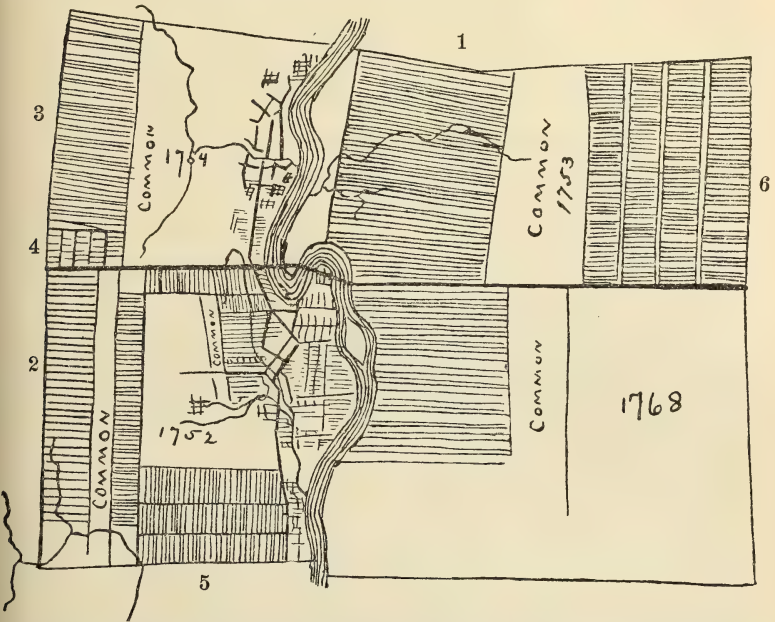
<sup>1</sup> Wind. Propr. Rec., p. 214.

<sup>2</sup> Weth. Rec., Dec. 25, 1752. Proprietors' meeting, in the same volume, Feb. 20, 1752.

<sup>3</sup> Hart. Rec., March 25, 1754. The Hartford division of 1754 was after this manner. The commons lay to the west of the town, and beginning at the southern boundary, thirty tiers of land were laid out, separated laterally by four principal highways and longitudinally by some twenty smaller and shorter highways; the length of this large tract was the width of Hartford township from Wethersfield to Windsor bounds, and its width about one mile. The size of the tiers was very unequal, some being divided into as many as forty lots, while others into as few as five, four, and two. This was partly owing to the position of the already established highways and the coursings of a small but meandering stream. Four

was an apportionment according to the grand list of the inhabitants, made in 1753, with the restrictions as in the other towns.

The following diagram will help to explain what has already been said. It represents the Hartford and Wethersfield townships, and pictures the scheme of tiers or ranges and the land basis of new towns.



1 is the three-mile tract division of 1640 and 1666 ; 2, the equal division of 1670 ; 3, the west division of 1672 ; 4, the overplus ; 5, the division of 1695 ; 6, a division not mentioned before because consummated after East Hartford became a separate township ; it was a part of the Five Mile Purchase, and shows the land basis of the town of Manchester.

With these divisions and with the carrying out of a few matters of recompense and equivalents, that all might be

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hundred and seventy-seven proprietors shared in this division, which adjoined the west division lots, now West Hartford, on the west. (From copy of a MS in possession of Mr. Hoadly, found among the Seymour papers.)

content, the mission of the proprietors practically ended. But the association still lingered and meetings were sporadically held. In fact, the common and undivided lands existed in Windsor as late as 1787, and traces of such are found in Hartford in 1785. The last meetings of the proprietors were chiefly for the purpose of appointing committees to search for undivided land, if there should be any remaining, which when found was to be divided to whomsoever had any claims. In case all claims could be met and land still remained, the committees were ordered to sell the residue, whether of lands undivided or of lands left for highways which were not needed, and after deducting from the amount arising from such sales a sum sufficient to pay themselves for all their trouble and expense, to give over the remainder to the ecclesiastical society of the town, the interest of which was to be appropriated to the support of the ministry or school, according to the discretion of the society. Thus with the object for its existence withdrawn, and with the resolution of the common lands into holdings in severalty, the association of proprietors became no longer necessary and died for lack of a *raison d'être*.

It will have been noticed that the system of general land division which obtained in Connecticut only differed in the different towns as regards the basis of allotment. The form was invariably that of ranges or tiers, often one but sometimes many lying adjacent to each other and separated by highways. These tiers were shared into sections or strips generally designated as of so many rods width, for the length would be uniformly the same. It is difficult to see the economic value of the extreme length of many of the sections thus laid out. When the length of a lot is three miles and its width a few rods, successful agriculture must be at a disadvantage. In many cases these were wood lots, but by no means in all. It is evident that many of those who received shares in the division sometimes sold them before they took possession, and it was to prevent such action that the Hart-

ford proprietors voted at the time of the division of the overplus that no one should sell his lot before he had fenced it in and improved it.<sup>1</sup> Generally, however, farmers soon removed to their sections and began improvement and cultivation, and it happened, as might have been expected from the shape, that great inconvenience resulted in preserving the bounds and cultivating the narrow strips.

As yet nothing has been said of the division of the Five Mile Purchase, the tract granted by the General Court to the towns in 1673. For our purpose it is only interesting as showing the origin of a proprietorship. The towns on receiving the grant at once provided for its purchase from the Indians, by a rating distinct from the other town rating, "that so the just sum of every man's payment to this purchase might be known for an equal division of this land according to their payments."<sup>2</sup> The rate was a halfpenny upon the pound in Wethersfield, and one hundred and fourteen inhabitants became the proprietors of this tract. The highest amount subscribed was seventeen shillings eight pence, and the smallest nine pence;<sup>3</sup> this to pay for a tract containing thirty square miles! For drawing up a special rate a special committee was appointed. Stringent rules were made regarding such as neglected to give in a new list at such a time, and in case any person falsified his statement and put in lands not owned he was denied a share in the common division. Special summons were given to the inhabitants at the time of drawing, as well as information as to where it was to be done, and the town clerk was the secretary of the meeting.

#### PROPRIETORS' COMMONS.

For a long time the common lands above described were in the hands of the proprietors or inhabitants-proprietors of

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<sup>1</sup> Hart. Book of Distr., p. 584.

<sup>2</sup> Weth. Rec., Oct. 10, 1673.

<sup>3</sup> Weth. Land Rec. III, p. 63.



the town, but it must not be supposed that the exclusive privilege of these large tracts of unimproved land was confined to the limited number who claimed ownership. In practice all the inhabitants made use of these commons, as the above quoted vote of the Hartford inhabitants shows, restricted only by self-imposed limitations, passed in town meeting. The value of the commons before division lay in their furnishing pasturage for horses, cattle and sheep, and providing the town with timber, stones, earth and grass. It is uncertain just where the earliest of these lay; there is little doubt, however, that many of the fields mentioned in the books of distribution were at first used as commons and soon after divided. Traces of them are found in Hartford in the old ox pasture, the ox pasture and the cow pasture. But the greatest commons were set off some years later when the cultivation of sheep assumed prominence. All the towns had these large strips of commonage, from half to three quarters of a mile wide. Wethersfield in 1674 laid off a large tract containing a thousand, and afterward twelve hundred acres, "to remain for the use of the Town in general for the feeding of sheep and cattle forever."<sup>1</sup> The Hartford tract, divided in 1754, retained its old name, the "Town Commons," for some years after it had ceased to be such. There was also the half-mile common next the Wethersfield west division, and the half-mile common on the east side of the river in Windsor township, and the larger tract in the same township adjoining the lands divided in severalty on the west side. All the New England towns had these fields of common land, for the settlers had been accustomed to the tenure in England, where it had existed from earliest times. In fact, the principle of commonage is as old as the settled occupation of land itself, and is not confined to any one class of people, but can be found among nearly all in some form or other. The large stated commons of New England were used by the majority for pasturage for their animals, yet all

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<sup>1</sup> Weth. Rec., Jan. 1, 1674.

cattle were not so kept, and we find in Connecticut enclosed pastures as well.<sup>1</sup> The expense of pasturing cattle on the commons was borne by the owners in proportion to the numbers and age of the animals. Town herders were paid in this way. Grants had often been made out of the common lands, which are to be distinguished from the stated commons, and such were reckoned to the owners as so much deducted from their share in the final division; but as soon as commons were established, granting from that quarter was stopped.<sup>2</sup> The boundaries of such commons were, after the fashion of the time, somewhat loosely laid out, and even in 1712, seventy-two years after the allotments in the "west field" of Wethersfield, it was found necessary to determine the line which separated that field from the adjoining common. If this were the case with the line adjoining the lands in severalty, much more must it have been true of the other boundary lines.<sup>3</sup>

Communal holding of land does not seem to have been known. Land held in common was subject to the use of a stated number, and when the inhabitants voted that so many acres of land were to be a settled common and "to remain for the use of the town in general for the feeding of sheep or cattle forever," the town was conceived of as composed of the inhabitants, an always increasing quantity, and town land was the property of the proprietors-inhabitants, and is so definitely stated.<sup>4</sup>

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<sup>1</sup> Weth. Rec., Dec. 31, 1683.

<sup>2</sup> Weth. Rec., Dec. 28, 1685. Encroachment on the commons as well as on the highways was a not infrequent offense. Sometimes the encroachment was sustained if found "no prejudice" by the town, though quite as often removal was ordered, and force employed if compliance did not ensue. Hart. Rec., Sept. 2, 1661; April 22, 1701; Weth. Rec., Dec. 25, 1704.

<sup>3</sup> Weth. Rec., Dec. 24, 1712. "At the same meeting ye town voated to have these lands which are refered for sheep commons or sequestered land layed out and bounded." Wind. Rec., Dec. 29, 1701.

<sup>4</sup> "For the use of the Town, viz. the inhabitants-proprietors." Weth. Rec., Mar. 15, 1707-8.

The proprietors-inhabitants held the land in common, and as they voted in new inhabitants not through their representatives, the townsmen, but in person in town meeting, it consequently lay in their power to admit new members to the privilege of having rights in the common field, and thus in theory, if they had any theory about it, neither stated commons nor undivided lands were town lands, though the records often call them so, but tracts for the use of a definite number of individuals, who called themselves the inhabitants-proprietors, and whose share, while not stated in so many words,<sup>1</sup> was generally recognized as proportionate to their purchased rights in the common and undivided lands. By later acts of the General Court, the corporate nature of the proprietors was recognized. In 1717 it was declared that all fields which at that time were considered common and so used should be so legally until the major part of the proprietors should vote for their division.<sup>2</sup> This was merely legalizing custom; such had been the common law for many years. A legal proprietors' meeting required the application of at least five persons to the justice of the peace for a warrant for a proper meeting, requiring proper warning six days before and a notice on the sign-post twenty days before.<sup>3</sup> Thus the proprietors became a regularly organized body, holding meetings, levying taxes on themselves for defraying the expenses of fences, gates, etc., and appointing rate-makers and collectors.<sup>4</sup> They also chose a clerk, who entered acts and votes, was duly sworn,<sup>5</sup> and held his office until another was sworn.<sup>6</sup>

One of the most troublesome matters which arose in con-

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<sup>1</sup> One vote, in recording a project for division, in which the major part of the proprietors decided the method to be employed, says "the voices to be accounted according to the interests that said persons have." Weth. Rec., Dec. 24, 1705.

<sup>2</sup> Col. Rec. VI, p. 25.

<sup>3</sup> Col. Rec. VI, p. 424.

<sup>4</sup> Col. Rec. VII, pp. 379-380.

<sup>5</sup> Col. Rec. VI, p. 25.

<sup>6</sup> Col. Rec. VI, p. 276.

nection with the commons was the prevention of trespass and damage. We have already noticed a sort of frontier lot-holder, who was granted lands on condition of his serving as ward of the commons. This protection was mainly against inhabitants from other towns, and intruders who had in some way come into the town itself. Temporary votes, however, were constantly passed, regulating even the proprietors' rights. Timber was carefully guarded. It was forbidden to all to cut down young trees, and any tree felled and left three months became public property. Carrying wood out of the town was almost criminal, no matter for what purpose. Yet, notwithstanding these constant decrees, damage continued to be done. Finally Wethersfield complained that the inhabitants-proprietors could hardly find timber for the building of houses and making of fences, and the lines of prohibition were drawn still tighter. The evil, however, was not entirely done away with until the final division of the remaining lands.<sup>1</sup>

One other matter in reference to the common fields is of interest. Every person in the towns above fourteen years of age, except public officers,<sup>2</sup> was obliged to employ one day in the year clearing brush on the commons. The townsmen appointed the day and all had to turn out. If any neglected to appear on that day he was fined five shillings.<sup>3</sup> On one occasion the undergrowth evidently got ahead of the inhabitants, for they voted to work that year one more day than the

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<sup>1</sup> The General Court as well passed acts forbidding the cutting, felling, destroying and carrying away of any tree or trees, timber or underwood. The act of 1726 recognizes the distinction between town commons, in which case trespass was accounted as against the inhabitants of the respective towns; common or undivided land, in which trespass was against the proprietors; and private lands, in which the person trespassed against was the individual owner. Conn. Col. Rec. VII, 80-81. On the subject of trespass see Weth. Rec., May 11, 1686; Dec. 25, 1693; Dec. 24, 1705; Dec. 23, 1706; Wind. Rec., Dec. 27, 1655; June 1, 1659; Nov. 11, 1661, and the volume of Wind. Prop. Rec.

<sup>2</sup> The minister of the gospel was a public officer in 1670, as he is to-day in Germany.

<sup>3</sup> Col. Rec. II, p. 139.



law required.<sup>1</sup> The fine of five shillings undoubtedly in many cases became a regular money payment in lieu of personal labor. This equal responsibility of all for the well-being of the town is one of the best evidences of its peculiarly democratic character, an extension of the same principles which were at work in the founding of the State. It may be a *descensus ad ridiculum* to pass from the establishment of the fundamental articles to shooting blackbirds, but it is just as much a government by the people, a controlling of their own affairs, when every rateable person was required to kill a dozen blackbirds in March, April, May, and June, or else pay one shilling to the town's use.<sup>2</sup> And it was the same obligation which called out the inhabitants to work on the commons.

#### COMMON MEADOW.

We have already spoken of the common or undivided land and the stated commons, but it is necessary to distinguish another class of common holding. This was the common meadow, early divided in severalty, which belonged to those proprietors who owned land therein. At first all the proprietors had a share in the common meadow, and for a long time after there remained land undivided, so that practically most of the inhabitants had a share. But with the sale of lands, and the consequent accumulation of many lots in single hands, the number of proprietors decreased, and an increasing number of the town inhabitants had no part in their meetings. These meetings, at which all who had a lot in the meadow were entitled to be present, are technically to be distinguished from the proprietors' meetings already spoken of. Practically they were composed of the same men who, as proprietors of the common meadow, came together to discuss questions of fencing, trespass, and rights.

These are the meadows, the regulation of which has been

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<sup>1</sup> Weth. Rec., May 11, 1686.

<sup>2</sup> Windsor Rec., Dec. 16, 1707.

found to bear such a striking resemblance to certain forms of old English and German land-holding. There is nothing specially remarkable in this identity. It was the influence of English custom which can be traced back to that interesting law of the Anglo-Saxons, "when ceorls have an allotted meadow to fence," which is the earliest English evidence of a common meadow.<sup>1</sup> These meadows became the Lammas fields of later England, which were cultivated for six months in the year, and were then thrown open for common use for six months. This state of things existed until the Enclosure Acts struck the death-blow to common tenure. But the settlers left England before these acts were passed, and the common meadow system has been found to have been applied by them from Salem to Nantucket.

This common meadow was enclosed by the common fence. In the river towns nature provided half the fence—the Great River—and the proprietors half. It would have been impossible to have surrounded each small plot of meadow land with a fence, and it would have been needlessly expensive and wasteful, as the spring freshets would have carried them off yearly. Even the common fence was not always exempt, and early had to be moved to higher ground. The lands which had been allotted within the meadow were divided by meer-stones at each corner, and hunting for meer-stones must have been a very lively pursuit then, as it occasionally is now. These meadows were owned by a definite number of inhabitants, who had fixed allotments of a definite number of acres, and who cultivated these lands for half the year. This gave to each proprietor a certain right in the meadow, according to which his share in the maintenance of the fence was determined, and the number of

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<sup>1</sup>Laws of Ine, §42. Schmid, *Gesetze der Angelsachsen*, p. 40. By this is not meant the *gemaene laese* or common pasture, but the *gedæl land*, that which is held by a few in common. The former bears a certain resemblance, which is the result of its own influence, to the commons, in their capacity as the common pasture.

animals he was entitled to admit on the opening of the meadow was established. This opening took place at a given date, quite as often fixed in town meeting as in proprietors', and cattle and horses were allowed to enter the fields and pasture on the stubble. Sheep and swine were not admitted; each had its own pasture; sheep were fed on the stated commons and swine were turned wholesale into the wilderness. No herder was required during this period, which lasted from November 11 to the 15th of April, through practically the cattle were withdrawn with the opening of winter.<sup>1</sup> Later this period became a moveable one and sometimes began as early as October 13. Evidently, at first, by tacit consent, it was allowable for certain proprietors to bait their animals in the common meadow upon their own holdings, if they so wished, during the summer. This was afterward restricted to week days, and finally abolished, as possibly too great a waste of time. The breaking loose of such baited animals and the breaking in of loose cattle to the meadow was a constant source of trouble, for great damage was done thereby to the corn and grass of others, and fines were frequent. Such animals were accounted *damage feasant*, a legal phrase which

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<sup>1</sup> There are curious and unexpected outcroppings throughout the old records of bits of English custom, as shown by names, dates, and common usage. Not only are these New England common meadows almost identical with the Lammas Fields and with the earlier Saxon meadow and arable, but this date, November 11 (Martinmas day), was the day of opening the Lammas Fields in Old England, and the time when the tenant paid a part of his rent. In other entries we find a period of time stated as "from Michaelmass to the last of November," "a week before Micheltid," and again, "fourteen night after Micheltid." The renting of the town lands of Hartford was from Michaelmas to Michaelmas. This was a direct following of the English custom of rents. How did the Puritans happen to retain and actually make use of these when they knew them to be "popish"? In the description of Hartford lands the term *messuage* is very often used, and continued to be used for many years. It sounds as if it might have been taken out of the Hundred Rolls or Liber Niger or Domesday Book, as signifying a cottage holding, so familiar is it to the student of early English tenures. In this country it was used in the sense of a homestead. The use of turf and twig has already been noted.

the old town clerks spelled in extraordinary ways. The sowing of winter grain was continued, and this, of course, would, if sown in the common meadow, suffer from the loose animals, so that, for a long time, a regular keeper was employed by the proprietors to guard the sown land, and afterwards it was required that all who wished to sow winter grain must fence it in. The customs regarding the common meadow are, some of them, still in existence. Permanent fencing has in many quarters encroached on its decreasing area, which, owing to the washings of an erratic river in the alluvial soil, has been in some quarters reduced nearly one-half, while in others there has been an increase. The cattle and cow rights, which were formerly so important, and were bought and sold, thus giving outsiders an entrance into the meadow, have been given up within twenty years. But the practice of throwing open the meadow about the middle of November—a date decided by the selectmen—is still continued.

#### ALIENATION OF LAND.

For the first seventy years of colonial history in the Connecticut Valley one notices a spirit of self-sufficiency in all matters which concern individual town interests. The communities felt that a careful husbanding of their own resources was necessary to swell their own subsistence fund. Apart from the fact of legal subordination to the General Court, the valley towns were within their own boundaries as exclusive as a feudal knight within his castle. No magic circle could have been more impassable than the imaginary lines which marked the extent of the town lands. This principle of town separation; the maintenance of its privileges as against all intruders; the jealousy with which it watched over all grants to the individual inhabitants, taking the greatest care that not one jot or tittle of town rights or town possessions should be lost or given up, characterizes everywhere the New England towns, and though a narrow, it was yet a necessary view. It made them compact, solid foundations, and bred men who,



while ever jealous for their native heath, never failed in loyalty to the State.

In no particular was this spirit more clearly evidenced than in the town's attitude toward the alienation of land. It is a subject worth elaborating. Apart from commonage, no link connecting the present with the past stands out in bolder relief, as if proud of its antiquity. The principle is found everywhere, and runs back to the beginnings of community life, that in case of sale of an allotted tract of land, the seller must first offer it to the inhabitants of the town itself before looking elsewhere for a purchaser. In Connecticut the need of securing the town lands from falling into the hands of outsiders was so strong that the General Court even went so far as to pass a law to this effect, forbidding any inhabitant to sell his "accomodation of house and lands until he have first propounded the sale thereof to the town where it is situate and they refuse to accept of the sale tendered."<sup>1</sup>

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<sup>1</sup>Col. Rec. I, p. 351. This is a widely recognized principle of community life. M. de Laveleye has shown by concrete examples that it exists in Russia, Switzerland, France, and in Mussulman countries, as Algeria, India and Java (Prim. Prop., pp. 11, 151-2). In those countries where community of holding was the rule, of course a law against sale can refer only to the house lot. It is a necessary part of primitive community life, where it was almost a religious tenet that the lands remain in the possession of the community. It has its origin in the patriarchal family which developed into the patriarchal community, wherein every member of the association was considered as owning a share in the lands of the commune, and therefore had a lawful right in the land which each cultivated. This may look back to the time when the community was but a large family under the patriarch, and when the principle of heirship gave to each a share in the common property. If this be its origin, it is curious to see that the New England towns applied this principle from economic reasons, for the safety and development of the town seemed to depend on some such rule. Such principles must have been known to the settlers, though only partially in practice in the English parish (see note 3, p. 84). It cropped out in its completeness on New England soil, though even there in some towns there was no more elaborate application than had been known in the mother country. To explain it it is not necessary to suppose a return to a primitive system; there is no missing link in the chain of direct descent from Germany to America.

This law was passed in 1660, and is the only instance in New England history in which the towns were unable to settle such matters for themselves.<sup>1</sup> The will of the court was binding, for the towns did not consider themselves sufficiently independent to interpret this law as they pleased. In 1685 they asked through their representatives whether the court intended that all lands within the township should "be tendered to sale to the town before any other sale be made of them to any other than the inhabitants of the town" where they were situated. To this the court answered in the affirmative.<sup>2</sup> One of the towns had already construed the law very strictly, though the above appeal to the court seems to show a growing uneasiness under the strictures of a prohibitive law.

Wethersfield declared in special town meeting regarding the division of 1670, that "no man or person whatsoever, who either at present is or hereafter be a proprietor in the lands mentioned shall at any time, either directly or indirectly, make any alienation, gift, sale or other disposition of his property in the said lands to any person who shall not be for the time being an inhabitant of this town."<sup>3</sup> In case such alienation took place the proprietor's right was forfeited, the sale void, and the land returned to the town for reallotment by the proprietors. This injunction, however, had to be twice repeated. Notwithstanding which there were sold, some time within the next fifteen years, six of these lots, and the attention of the town having been called to it, in order that the former vote should not be a mere dead letter, it was ordered that the lots be recovered and returned to the town. The committee of one appointed to recover was given two of

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<sup>1</sup> The question was brought up in the Massachusetts Court as to whether the towns had the right of pre-emption or forbidding of sale. No action was taken, and possibly the court thought the matter a subject for town management. Mass. Col. Rec. I, 201.

<sup>2</sup> Col. Rec. III, 186-7.

<sup>3</sup> Weth. Rec., Mar. 8, 1670-71.

the lots as payment, and the remainder reverted to the town. It would be interesting to know whether this restriction upon freedom of sale was actually carried out.<sup>1</sup>

The town passed a similarly binding law at the time of the second division, but nothing further is heard of the matter. Hartford having voted in 1635 that the offer of house-lots must first be made to the town, or to some one of whom the town approved, said nothing more about alienation, and the General Court order was passed before it made another division. Windsor began to divide after such laws had ceased to be necessary, and made no restrictions on sale; but in many other towns in the colony the principle was applied. The object of such a law was evidently twofold: to prevent town lands from falling into the hands of persons dwelling in other towns or colonies, with the consequent loss to the town of all the fruits of its own territory, and to prevent the admission of persons likely to be obnoxious or injurious to the town's interest; for Hartford and Windsor each required—at least in a few instances—that the owners of land should secure the town against damage resulting from sale to an outsider.

There is little doubt that rules of this nature in practical application were often relaxed. Hartford allowed in 1640 to all her original settlers the privilege of selling all the lands that they were possessed of, and there is plenty of evidence that sales had taken place from the earlier divisions, though not to persons dwelling out of the colony. The increase of inhabitants would make the enforcement of such a rule a matter of constantly greater difficulty. In comparing the Wethersfield order with those of other towns, we find none so strict in the declaration of the alienation principle.<sup>2</sup> Others allowed, as did Hartford in one instance at least, in case no purchaser

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<sup>1</sup> In 1696 an inhabitant applied to the town for liberty to sell an individual grant, on account of necessity. The liberty was granted. Evidently the principle against sale without permission was still enforced. *Weth. Rec.*, Aug. 7, 1696.

<sup>2</sup> Egleston, *Land System*, J. H. U. Studies IV, pp. 592-594.

was found in the town itself, the effecting of a sale elsewhere, generally with the approval of the community. But the fact that the inhabitants of the town practically controlled the land divisions, while in Hartford and Windsor they were managed by the proprietors, together with the presence of a General Court order, may account for the absence from the records of the latter towns of as elaborate an order against alienation as is found in Wethersfield.

### EVOLUTION OF NEW TOWNS.

The river towns were prolific mothers. Ten daughters now look to them for their origin, and the total number of communities contained within the historic boundaries of the early settlements now equals the number of the original colonies. Windsor has been the mother-stock from which four towns have been severed; Wethersfield three, and Hartford three.<sup>1</sup> In the various allotments of lands do we see the beginnings of new towns. The isolated settler (at first probably with temporary summer residence which afterward became permanent) would be joined by others to whom the town made single grants in that quarter. The lands on the east side of the river were early used for farming, and the site of future towns became a source for hay and a corral for keeping cattle. The development of such a centre was by gradual accretion. In the event of a general division of land, many of those who received shares withdrew to these lots, and, erecting houses, began the nucleus of a town. The original outlying districts were called Farms, and this nomenclature

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<sup>1</sup> Windsor: East Windsor, South Windsor, Ellington, Windsor Locks. Wethersfield: Glastonbury, Rocky Hill, Newington. Hartford: East Hartford, West Hartford, Manchester. No account is here taken of Farmington and Simsbury, as these sections were not included within the limits of the river towns, although by general consent they were considered as belonging, the former to Hartford and the latter to Windsor. Nor are there included those portions of territory which were cut off to form but a part of another town, as Berlin, Bloomfield, and Marlborough.

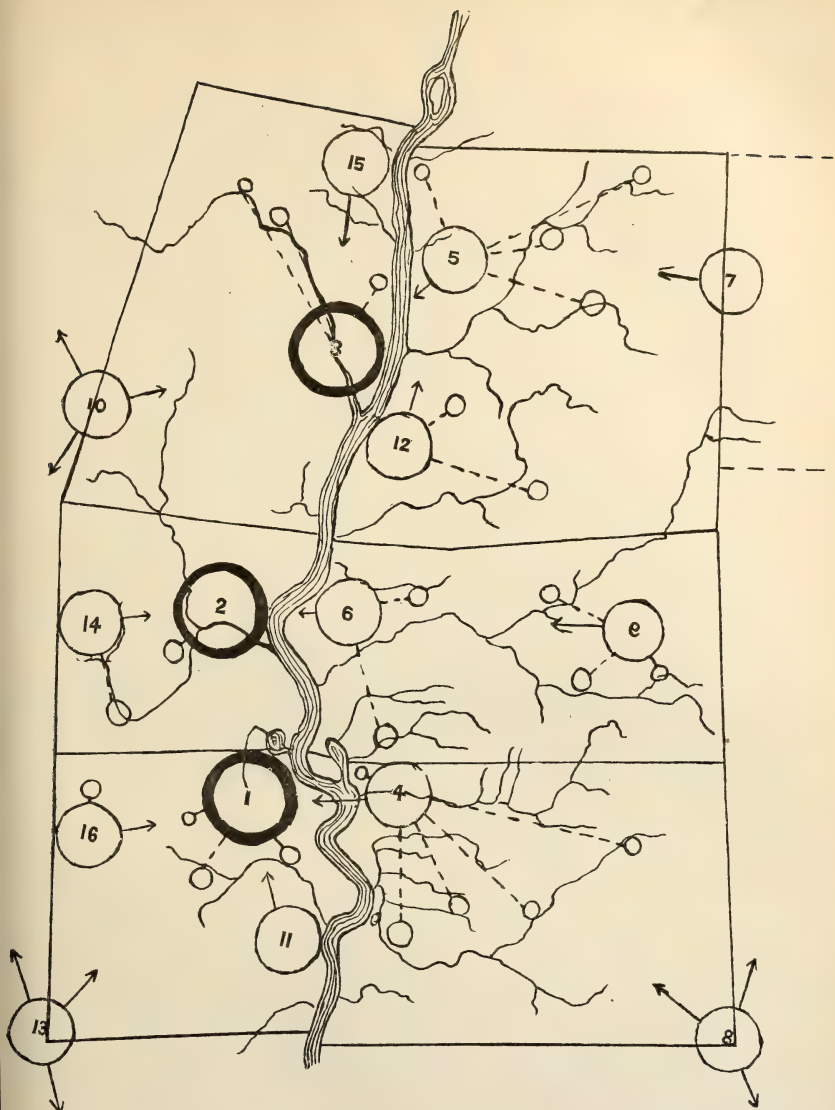


is generally found in the Connecticut colony.<sup>1</sup> The dwellers in the farms still continued to be present at the only meeting-house in the township, and to cross the river or the belt of dense woods for attendance at the monthly town meeting. But it was not long before that oldest of institutions, the village pound, which is said to be older than the kingdom, was established and formed the first centralizing factor. Before the community was recognized as either a religious or a civil unit, before a thought of separation had entered the mind of its founders, it received permission to "make and maintain a pound"<sup>2</sup> for the common use of the settlers, sometimes without condition, sometimes subject to the approval of the town. The pound began the process of separation; in this one particular a settlement became economically independent, and the greater privileges only awaited an increase in the number of the inhabitants. The next step in the separating process was generally an ecclesiastical one. Sometimes the religious and civil steps were taken at the same time, as was the case in Glastonbury, where the difficulties of crossing a large river hastened the process. In other cases

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<sup>1</sup> In a catalogue of ministers in Massachusetts and Connecticut, by Cotton Mather, is the following: *Windsor*, Mr. Samuel Mather; and *Farme*, Mr. Timothy Edwards. The term *side*, though used in Connecticut, does not seem to have had so distinctive a meaning as in Massachusetts. Yet it is found to designate the halves of a town divided by a rivulet, as in Windsor and Hartford. Each *side* had its own meetings and its own officers in Hartford. "To secure the said Town and Side from damage." (Hart. Rec., p. 153.) Yet in no case did a *side* grow into a separate town, though at times certain officers, as haward, were chosen by the *side*.

<sup>2</sup> Weth. Rec., Feb. 24, 1673; Oct. 15, 1694; Hart. Rec., June 9, 1645. Glastonbury claims the first recognition of that part of Wethersfield as an independent community to be the act of the General Court in 1653, giving the Eastsiders liberty of training by themselves. (Chapin's Glastonbury, p. 37.) This was twenty years before that part of the town was granted a pound. The date of the beginnings of recognition can even be put back two years farther, when in 1651 liberty was granted to the Farms anywhere in the colony, of reserving for their protection one able-bodied and fully armed soldier on training days. (Col. Rec. I, p. 222.) In the case, however, of original settlements, setting up a pound was one of the first acts.



### EVOLUTION OF NEW TOWNS.

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|------------------------|---------------------------------|-------------------------|
| 1 Wethersfield.        | 7 Ellington, 1786, lying partly | 12 South Windsor, 1845. |
| 2 Hartford.            | in the Equivalent.              | 13 Berlin (1785), 1850. |
| 3 Windsor.             | 8 Marlborough, 1803.            | 14 West Hartford, 1854. |
| 4 Glastonbury, 1690.   | 9 Manchester, 1823.             | 15 Windsor Locks, 1854. |
| 5 East Windsor, 1768.  | 10 Bloomfield, 1835.            | 16 Newington, 1871.     |
| 6 East Hartford, 1784. | 11 Rocky Hill, 1843.            |                         |

The smallest circles represent villages legally a part of the towns to which they are attached. The arrows on the severed towns point to the original town of which they were formerly a part. Towns with three arrows were formed from land taken from three original townships. The above are the original boundaries of the River Towns, but the river course is as at present.



the difficulties of winter attendance led to the granting of winter privileges, that is the privilege of having service among themselves during the winter. Even the stiff-necked Puritans did not relish the idea of travelling five, six and seven miles to church, and foot-stoves and hot stones were not so comfortable as the neighboring room where they would meet to worship together. Often, however, winter privileges were not sufficient, and "liberty of a minister" was asked for from the first. In this case a meeting-house was generally built and minister's rates established, and a grant of land made. Here we notice the paternal character of the General Court, for though the petition was generally sent to the authorities of the town of which they formed a part, yet it invariably had to be confirmed by the central power. Sometimes the Assembly paid deference to the wishes of the town, as in the case of South Windsor, where, finding Windsor unwilling to consent to the separation, it requested the petitioners to wait.<sup>1</sup> In East Windsor the report of the committee appointed to consider the petition was adopted, notwithstanding some remonstrance from the Southsiders.<sup>2</sup> Again, in the case of Ellington, the town of Windsor granted the petition temporarily, retaining the privilege of again demanding ministerial taxes when she pleased. But the Assembly a little later freed them from this, and granted them a permanent ecclesiastical separation.<sup>3</sup> With the granting of winter preaching went the remission of a third of the ministerial taxes, and with the granting of full privileges an entire remission of these taxes and a grant of land to the new ecclesiastical centre for a parsonage. Then followed the incorporation of the society, for the church did not become legally established with the corporate powers of a parish until it had received a charter from the Assembly.<sup>4</sup> When this act was completed, town and parish were no longer coterminous. The inhabitant of the township attended town meeting in the central

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<sup>1</sup> Stiles, Windsor, pp. 292 ff.<sup>2</sup> *Ib.* pp. 226 ff.<sup>3</sup> *Ib.* pp. 267 ff.<sup>4</sup> Col. Rec. V, p. 374.



settlement when he wished, and worshiped God at the neighborhood meeting. Town and parish records were now kept distinct from each other, the society had its own committee and collected its own rates ;<sup>1</sup> as far as practical separation was concerned the two settlements were already independent. The obligation to perform religious duties was felt to be greater than that of attendance on civil assemblies. Absence from town meeting was not uncommon, from worship rare.

While this process was going on, a gradual political independence was taking place. This began with the election for the growing community of sundry officers, such as haward, fence-viewer, and surveyor, who were generally inhabitants of the settlement, and served only within its borders. The embryo town was gradually assuming shape. It had its pound, its meeting-house, its ecclesiastical committee, its school and special officers, and many a village in Connecticut is in the same condition to-day, often thinking little of the next step, which only an active desire for civil independence brings about. In the case of Glastonbury, winter privileges, full ecclesiastical privileges, and political independence were consummated at one stroke; but with many of the other towns the process was slow. Sometimes incorporation was granted at the first petition, more often frequent petitions were necessary.

It is difficult to defend Professor Johnston's idea of incorporation.<sup>2</sup> All the towns of the Connecticut colony were either offshoots from the original town in the way already pointed out, or they owed their settlement either to the movements of dissatisfied members of the older communities, or (because of a favorable situation for a plantation) to the efforts of the court, or of some private individual to whom land had been granted. In the first of the latter cases, as soon as the idea of settlement took practical shape, a petition was sent to the General Court praying for permission to inhabit the selected spot.

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<sup>1</sup> Col. Rec., Oct. 12, 1699.

<sup>2</sup> Johnston, Connecticut, pp. 76, 136.

This was generally granted with readiness, often with advice and encouragement, if done in an orderly way, and a committee was appointed by the court to report on its feasibility, and to superintend the settlement and have charge of the division of lands. In the second case a committee was directly appointed, which was instructed to dispose of the lands "to such inhabitants . . . as by them shall be judged meet to make improvements thereof, in such kind as may be for the good of the commonwealth."<sup>1</sup> Sometimes the colony purchased the land, and the amount was to be repaid by those who took allotments there.

Then the process of settling in the new quarter began, under the watchful eye of the court, and under the direct charge of the Grand Committee, as the town records call it. This committee governed the plantation until it was incorporated; it made rules for the planters, prescribed the conditions of settlement, as that the lands should be dwelt upon for at least two years, and that improvements should begin at once by ploughing, mowing, building and fencing; it selected the site, laid out the home-lots, disposed of them by sale or grant, looked after highways and fences, made suitable provision for the church, minister and schools, and in fact did all that the town authorities of an incorporated town were accustomed to do. "They were to found a town, to organize it, and to supply it with locomotive force until it got legs of its own."<sup>2</sup> After this process of nursing, the infant settlement became weaned from the direct control of the court, to which it owed its existence, and upon which it was entirely dependent through the Grand Committee, until the court itself at length severed those ties which bound it, by the decree of incorporation. This often took place within a year, as in the case of Mattabeseck (Middletown), or within four or five years, as in the case of Massacoe (Simsbury). The town was now entitled to the privileges and subject to the burdens

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<sup>1</sup> Col. Rec. I, p. 161.

<sup>2</sup> Bronson's Waterbury, p. 8.

of the other towns; it now elected its constable, and presented him to the court for approbation and oath; it chose its deputies, its town officers; began its town records, admitted its own inhabitants; in a word, did all that the committee had before done. For the first time it became independent, for the first time attained to that degree of self-government which the river towns possessed, limited though they were by the overshadowing of the General Court. Incorporation meant a great deal; besides self-organization, it meant payment of rates, "in proportion according to the rule of rating for their cattle and other visible estate";<sup>1</sup> it meant a constable, deputies and freemen; in brief, it meant manhood. In case of towns incorporated within the first sixty years, no objections were made to granting them this privilege. The colony needed new towns, and encouraged their settlement and growth by every possible means. But after that time, when the majority of incorporated towns were severed sections of an old town, incorporation became a different matter. Had it been granted to every petition, it might have been construed as a mere form; but it was by no means so granted. The General Court was the power above the town, and was always so recognized. The town was less a republic than she is now. East Hartford petitioned for sixty years for the privileges which incorporation carried with it. The term meant something, it was the admission into the body politic of an organized community, but the right of deciding when it was properly qualified lay with the Assembly, and it had no rights except what that body allowed it. It is worthy of notice that it was as a rule the lower house which negatived the petition. Too often the records of the colony chronicle only the birth; the travail attending it can only be fully understood by searching the minutes of town and church. The word of the court was final, and without exception was desired, waited for and accepted.

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<sup>1</sup> Col. Rec. I, p. 228.

The same was true of ecclesiastical incorporation. Questions regarding religious differences, the settlement of ministers and the organization of churches, were interfered with or settled either with or without the request of the town. But with the later divisions of churches and the establishment of separate parishes, the position of the State church gradually ceased for the Congregationalists. New denominations came into the field, which received recognition, thus estopping in such cases the Assembly from any interference in matters of church organization or separation. The town lost even its distinctive position as a parish, and became merely a local administrative body.



## III.

## THE TOWNS AND THE PEOPLE.

We have now examined the nature of the causes and circumstances which led a remarkable people into this quiet Indian valley. We have investigated their relations to the soil which they cultivated, and the manner in which they endeavored to so apportion it that the greatest good might come to the greatest number. It now remains to discuss the conditions existing among the people themselves, in their civil and administrative capacity, to discover the real strength of their town life, that we may perhaps the better understand what was the home environment of those men, whose combined actions as a body politic have called forth deserved admiration for the history of a vigorous State.

## FREEMEN, INHABITANTS, HOUSEHOLDERS, PROPRIETORS.

No one of the characteristic differences between Massachusetts and Connecticut is so well known and so far-reaching as the extension of the privilege of freemanship. The errors which must accompany a restriction of the suffrage to church members find no place in the Connecticut fundamentals. The platform was broad, and based on the opinion of the majority of the people composing the commonwealth. The theocratic limitation takes for granted a falsity: that every church member must of necessity be the most worthy participator in civil affairs. Thus there would be admitted to the franchise men of inferior and unworthy qualifications, while many of sagacity and wisdom, and often greater conscientiousness, would find themselves debarred.<sup>1</sup> No greater privilege could be accorded to a town and its inhabitants than that inserted in the first section of the constitution of 1639, that

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<sup>1</sup> Ellis, *Puritan Age*, p. 209.

choice of the governor and magistrates "shall be made by all that are admitted freemen and have taken the oath of Fidelity and do cohabitte within this jurisdiction (having beene admitted Inhabitants by the major part of the Towne wherein they live) or the major parte of such as shall be then present."<sup>1</sup> This, then, threw the burden on the inhabitants of the different towns, who, so far as the constitution went, might regulate the admission of additional inhabitants as they pleased. That the same general rules for such admission were operative in each of the towns is undoubted, otherwise the equity of the law would have been destroyed.

Before going further, then, it is necessary to examine the conditions which influenced the inhabitants of a town in adding to their number. For the first sixty years the township and the parish were identical. There was one meeting-house, and here met inhabitants to perform both civil and religious duties. The affairs of town and church were alike passed upon at the civil meeting, and it is not surprising that the religious atmosphere lingered in the historic edifice to influence the words and acts of a purely civil body. The conformity to the laws of the church would compel a recognition of its precepts in matters of government. Theoretically, church and state were separated; practically, they were so interwoven that separation would have meant the severance of soul and body. Consequently, whosoever failed to meet an approval based on the general principles of doctrine and ethics which the church believed in, would be rejected as an unfit inhabitant. But such unfitness must not be construed as in any way comparable with the narrow lines laid down in Massachusetts. For the town's own protection it was necessary that all who would be burdensome to it, or would, from factious or drunken conversation, be damaging to its interests or its reputation, should be forbidden admission.

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<sup>1</sup> Col. Rec. I, p. 21. The passage in parenthesis was probably inserted in 1643, when an amendment to that effect was passed by the General Court. (Col. Rec. I, p. 96.) For the Oath of Fidelity see Col. Rec. I, p. 62.

The opinion of the majority was likely to be averse to all positively out of harmony with their Congregational tenets, such as "loathsome Heretickes, whether Quakers, Ranters, Adamites or some others like them." It was not, however, until 1656 that the General Court, following the recommendation of the Commissioners for the United Colonies, passed an order forbidding the towns to entertain such troublesome people.<sup>1</sup> But no one became a permanent resident of the town until he was admitted an inhabitant. The floating body of transients were a political nonentity, and though from the nature of things they formed a necessary element, one can hardly call them, as does Dr. Bronson, a rightful element.<sup>2</sup> Their rights were meagre in the extreme, and the towns, paying them a scant hospitality, got rid of them as rapidly as possible. As early as 1640 Hartford passed a vote ordering that whosoever entertained any person or family in the town above one month, without leave from the town, should be liable for all costs or troubles arising therefrom, and at the same time might be called in question for such action.<sup>3</sup>

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<sup>1</sup> Col. Rec. I, pp. 283, 303. Compare Bronson, *Early Government in Connecticut*, p. 312.

<sup>2</sup> Bronson, *Early Government*, p. 311.

<sup>3</sup> Hart. Rec., Jan. 14, 1639. Probably Wethersfield and Windsor passed similar orders, though the records are missing for the first fifteen years. It is evident that the same economic reasons against alienation or rent of land to strangers without giving security were at work in the English parish, so that in this particular the colonists simply enlarged, on account of the greater dangers of their situation, a condition with which they were familiar. Notice this by-law of Steeple Ashton parish: "Item: whereas there hath much poverty happened unto this parish by receiving of strangers to inhabit there, and not first securing them against such contingences . . . It is ordered, by this Vestry, that every person or persons whatsoever, who shall let or set any housing or dwelling to any stranger, and who shall not first give good security for defending and saving harmless the said Inhabitants from the future charge as may happen by such stranger coming to inhabit within the said parish,—and if any person shall do to the contrary,—It is agreed that such person, so receiving such stranger shall be rated to the poor 20 sh. monthly over and besides his monthly tax." (Toulmin Smith, *The Parish*, pp. 514-15; see also p. 528 for a similar by-law in Ardley parish, Hertfordshire.)

Can we not fairly say that before 1657 there was universal suffrage in Connecticut, and approximately complete representation? It was more universal than it is now, for freemanship was conferred upon all above sixteen who brought a certificate of good behavior from the town.<sup>1</sup> This ideal democracy is the more striking when we realize that in Massachusetts none but freemen (chosen by the General Court) could "have any vote in any town in any action of authority or necessity or that which belongs to them by virtue of their freedom, as receiving inhabitants or laying out of lotts, etc."<sup>2</sup> This meant that only about one-sixth of the inhabitants of a town were allowed any voice in matters for the carrying out of which all the inhabitants were taxed. The building of the church, the maintenance of the same, the election and institution of the minister, were in the hands of the few, yet for all these the many paid their proportion. No matter how many inhabitants a town contained, unless there were ten freemen among them, they were allowed no representation at the General Court.<sup>3</sup> It is by such a contrast that we appreciate the full meaning of the liberal attitude of Connecticut for the first twenty years of her history.

To what, then, are we to ascribe the narrowing of the political boundaries which took place in 1657? It has been said that there was an infusion of an inharmonious element at this time into the colony, evidently referring to the Quakers. These people appeared in Boston first in 1652. Their numbers were very small, and strenuous efforts were made to keep them out. Their books were burned, themselves committed to prison, and shipmasters enjoined, on penalty of fine and imprisonment, not to bring any into the colonies. In Connecticut an unfortunate controversy in the church in Hartford caused the appearance of the Quakers to be viewed with alarm. The General Court eagerly followed the recommenda-

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<sup>1</sup> Col. Rec. I, p. 139.

<sup>2</sup> Mass. Col. Rec. I, p. 161.

<sup>3</sup> Mass. Col. Rec. I, p. 178.



tion of the United Commissioners and passed a law against them two weeks before the Massachusetts court convened.<sup>1</sup> But there is not the slightest evidence that there had yet come a Quaker into Connecticut; the dread of them was enough. The colonial magistrates scented Quakerism from afar and passed laws as stringent as if this "cursed set of haeriticks" were already as thick as tramps in the colony. Even in New Haven, more easily reached by Quakers escaping from Massachusetts, there was a minimum of cases tried under the law.<sup>2</sup> If any Quakers reached Connecticut they passed unnoticed by the towns, though the records notice the presence of Jews. It does not seem possible, then, to ascribe to this cause the passage of the law in 1657 limiting the suffrage. This law defined admitted inhabitants, mentioned in the seventh Fundamental, that is the freemen, as "householders that are one and twenty years old or have bore office or have 30 l. estate." This meant, interpreted, that no unmarried man in the colony could vote for governor, magistrates or deputies unless he had himself held office or was possessed of real estate of thirty pounds value—a large sum in those days when rateable estate averaged about sixty pounds to each inhabitant.<sup>3</sup> But this law has nothing to do with the persons to be admitted into the various towns as inhabitants; it only declared that hereafter admission into the various towns as inhabitants was not a sufficient qualification for a freeman. The colony was losing faith in its towns. As before said, in connection with the proprietors,<sup>4</sup> the meetings were in the control of those who were admitting such as were not of honest conversation and, in the eyes of the court, acceptable as freemen. The cause of this is not far to seek. The first generation were passing away; the fathers were giving way to the children. The narrow circle within

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<sup>1</sup> Col. Rec. I, pp. 283, 303, 308. Mass. Col. Rec. IV, Part I, pp. 277, 278.

<sup>2</sup> Levermore, New Haven, pp. 135-6.

<sup>3</sup> Col. Rec. I, p. 293. Bronson, Early Government, p. 315.

<sup>4</sup> *Supra*, pp. 52-3.

which the former were willing to grant the exercise of pure democratic principles was broadening under the more catholic views of the new generation, and men of many sorts seem to have been admitted, or to have established themselves without the knowledge of the town authorities. If the dying out of the old spirit ushered in an era of religious change, as seen in the Hartford controversy, it also marks an era of political change, as seen in the law limiting the suffrage. It makes a small show on the statute book, but it is a sure index to the looseness of system which had grown up in the various towns. But if the children and those whom they admitted controlled in the towns, the fathers were in ascendancy at the court, and the limitation law was the result. Yet not even this law was stringent enough. In the lists of 135 inhabitants made freemen within the ensuing two years, are to be seen, mingled with the names familiar to the student of the earlier period, many entirely new to the colony. This number was too great—considerably more than half of all admitted in twenty-three years under the constitution,<sup>1</sup>—and the court changed the thirty pounds real estate to thirty pounds personal estate.<sup>2</sup> On this account but three new freemen were created during the next three years and a half before the receipt of the charter. This action of the court apparently aroused the towns to a realization of their position, and Windsor passed an order regulating the admission of inhabitants in June, 1659, and Hartford followed with a forcible protest against intruding strangers the February following, in which it is declared that no one was to be admitted an inhabitant “without it be first consented to by the *orderly* vote of the inhabitants.”<sup>3</sup> The word which we

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<sup>1</sup> Bronson, *Early Government*, p. 315.

<sup>2</sup> Col. Rec. I, p. 331.

<sup>3</sup> No abstract of these votes could be so graphic as the votes themselves. “The townsmen took into consideration how to prevent inconvenience and damage that may come to the town if some order be not established about entertainment and admitting of persons to be inhabitant in the town.

have italicized is the key to an explanation of what had been the condition of the meetings before, and helps to substantiate the position already taken regarding a growing looseness in the town system. The machinery for admission had not been successful under the constitution; it had caused much trouble, and the cause seems to have been organic. With church and state practically interwoven, the theory of the one was too narrow, and of the other too broad. The throes of the controversial period had this result. By the Half Way Covenant the lines of church theory were extended; by the restrictions upon the right to vote, the lines of the theory of state were contracted; and these two great factors, democracy and church membership, no longer so unequally yoked, and made more harmonious by that liberal guide for action, the charter, ceased to struggle for the supremacy; neither was destined to swallow the other.

With the narrowing of the elective franchise,<sup>1</sup> the right was

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We therefore order that no person or persons whatsoever shall be admitted inhabitant in this town of Windsor without the approbation of the town or townsmen that are or shall be from year to year in being. Nor shall any man sett or sell any house or land so as to bring in any to be inhabitant into the town without the approbation of the townsmen, or giving in such security as may be accepted to save the town from damage." (Wind. Rec., June 27, 1659, vol. I, p. 40.) Stiles gives the year wrongly, 1658 (p. 54). The Hartford record is as follows: "for the preventing future evils and inconveniences that many times are ready to break in upon us, by many persons ushering in themselves among us who are strangers to us, through whose poverty, evil manners or opinions, the town is subject to be much prejudiced or endangered. It is therefore ordered at the same town meeting that no person or persons in Hartford, shall give any part of his or their house to him or them whereby he or they become an inmate, without it be first consented to by the orderly vote of the inhabitants at the same town meeting, under the forfeiture of five pounds for every month, to be recovered by the townsmen in being by a course of law." (Hart. Rec., Feb. 14, 1659 (1660 N. S.).

<sup>1</sup> It is not our purpose to trace further the history of popular suffrage. With the coming of the charter a law was passed which, as it practically remained the law till 1818, is worth quoting: "This Assembly doth order that for the future such as desire to be admitted freemen of this corpora-

taken away from a number of inhabitants of voting for colonial officers. Every freeman was an inhabitant, but not every inhabitant a freeman. For the former the only qualification was that he be of honest and peaceable conversation and accepted by the major part of the town. In 1682 the court passed a law forbidding persons of "ungovernable conversation," who pretended to be hired servants, or who pretended to hire houses and lands, and who would be likely to prove vicious, burdensome and chargeable to the town, from remaining there. Wethersfield, acting upon this, at once warned four men out of town. The towns frequently declared certain persons "no inhabitants," and in general carried out the provisions of the law with celerity.

Within the circle of inhabitants were the householders, who, as the name implies, were probably heads of families, or owners of a sufficient amount of real estate. A study of the list of those who received in the division of 1670<sup>1</sup> shows that eight were probably not freemen, and five were women.<sup>2</sup> Of course this gives us no positive clue to the position of a householder, but it shows that in the Connecticut colony one need not be a freeman and might be a woman. The simplest

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tion shall present themselves with a certificate under the hands of the major part of the Townsmen where they live, that they are persons of civil, peaceable and honest conversation and that they have attained the age of twenty-one years and have 20 l. estate, besides their person in the list of estate; and that such persons so qualified to the court's approbation shall be presented at October court yearly or some adjourned court and admitted after the election at the Assembly in May. And in case any freeman shall walk scandalously or commit any scandalous offence and be legally convicted thereof, he shall be disfranchised by any of our civil courts." Col. Rec. I, p. 389.

<sup>1</sup> See p. 56.

<sup>2</sup> The seventy-six names in the Wethersfield Records, compared with the list of freemen of 1669 (Col. Rec. II, p. 518), leaves twenty names unaccounted for. Two of these are found in the Hartford lists. Eight more were propounded in May, 1669, and accepted in October, 1669. Two others, propounded in May, 1670, were accepted in October, 1670. The division did not take place until the February following. This leaves only eight unaccounted for, of which the recorded admission of two with similar names makes further reduction to six possible.



definition of a householder is the head—male or female—of a household.

The position of the proprietors has already been practically discussed. They probably formed a small circle of men within the larger circle of householders and inhabitants, composing, as has been well said, a land community as distinct from the political community.<sup>1</sup> A proprietor was not of necessity, however, resident, though in the majority of cases he was so. In origin they were a body of men who collectively purchased lands of the natives, through grant of the General Court or otherwise. The right of each in the purchased land could be sold, exchanged, or left by will. Generally on removal such rights were sold to new-comers, who thus became proprietors, or some one of the inhabitants by such purchase added to his own rights. Often they were retained and looked upon as stock in a corporation.<sup>2</sup> This naturally led to the existence of proprie-

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<sup>1</sup> Egleston's Land System, p. 581.

<sup>2</sup> We find records of the conveyances of title in the common lands of a town from one person to another. Such right and title was valued according to the number of pounds annexed to the name of the proprietor in a certain list at the time of division. This number of pounds right was proportioned to the amount which the person had given in original payment for the lands. To show how such rights passed from hand to hand we have record as follows: "Edward Ball and James Post of Saybrook convey all their right, title and interest in the common and undivided land of Hartford to Samuel Talcott, Samuel Flagg and Daniel Edwards, being the right of Stephen Post, formerly of Hartford, dec<sup>d</sup>, whose name appears in the list of Proprietors in 1671 with a £24 right" (Hart. Book of Distr., p. 149). Such a right was divisible and could be sold in parts to different persons, and when laid out, was not so done all at once. The above list is found in Book of Distr. p. 581, with each proportion in pounds, highest £160, lowest £6. The division was generally acre for pound. The rights are spoken of as £24 right, £10 right, etc., and half and quarter rights are mentioned where a man purchased part of the right of another. This quotation shows the workings of the system: "Laid out to Thomas Sandford, one of the legal heirs of Jeremy Adams, one of the ancient proprietors of the sum of £15, which is what remains of said Adams' right to be laid out, and also £5. 6. 10. in the right of Robert Sandford under Hale, which is all that remains to be laid out in said right." (Hart. Land Records, 18, p. 477.)

tors holding rights in one town and living in another, or even out of the colony, and troubles frequently arose. It was a claim of this kind which gave rise to a vexatious suit, lasting three years, of an inhabitant of Hartford, for one hundred acres of land in Wethersfield, he basing his claim on his right in the division of 1693, as received from his father-in-law. The neglected proprietor won his case.<sup>1</sup> The proprietors, as such, had no political rights. It was only in their capacity as admitted inhabitants that they voted in town meeting.

Thus we have seen that the people composing a town in the Connecticut colony were made up of inhabitants, householders, proprietors, and freemen, no one class entirely excluding another, while the majority of adult males could undoubtedly lay claim to all four titles. The right to vote in town meeting and to hold town office at first was the privilege of any one admitted by the town. But as time went on it is evident that the same looseness of system which led to the limitation of the general suffrage was to have its effect on the towns themselves. The "honest conversation" clause had to be repeated by the court, and the votes already recorded explain the action of two of the towns in 1659. Wethersfield has a very caustic protest of a later date from twenty-eight inhabitants, and possibly proprietors, which speaks of the "cunning contrivances and insinuations which men are studious to doe . . . voating in town meetings when the inhabitants have many of them been withdrawn, and because there is not enuff present to countermand their proceedings," etc.<sup>2</sup> So we may be sure that there was some ground for the passage by the court of a law restricting the

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<sup>1</sup> Mr. Hooker's suit was a matter of great concern to the town. Fearing to lose the land, the town even empowered the selectmen, in case the suit went against them, to "address her Majestie by petition, praying her Majestie take notice in this case, and do as in her wisdom her Majestie shall see meet, whereby justice may be done." Weth. Rec., Oct. 4, 1708; July 8, 1710; Dec. 18, 1710; April 24, 1711; August 30, 1711.

<sup>2</sup> Weth. Rec., Jan. 28, 1697.

right of voting in town meetings. In 1679 the court decreed that because there were a "number of sourjourners or inmates that do take it upon themselves to deal, vote or intermeddle with public occasions of the town or place where they live," therefore no one except an admitted inhabitant, a householder and a man of sober conversation, who has at least fifty shillings freehold estate, could vote for town or country officers or for grants of rates or lands.<sup>1</sup> The towns take no notice of this order, and if it was carried out, as was probably the case, it was practically the first limitation on the right of voting in regular town meeting. The towns clung to their democratic principles longer than did the colony.

#### GROWTH OF THE OFFICIAL SYSTEM.

There seems to be a good deal of misapprehension, particularly among those to whom the early history of the colony in its detail is not familiar, regarding the exact nature of the settlement. It has been conceived of as the bodily transportation of three organized towns, as if the emigrants migrated like an army completely officered. It is true that nearly all<sup>2</sup> the settlers came from three Massachusetts towns, but they by no means came all at once. Two of the bodies came as organized churches, but this was after the three centres of settlement had been occupied by previous planters, and after they had become towns in the eyes of the law by the act of the provisional government, based on the decree of the Massachusetts court the year before.<sup>3</sup> Mr. Hooker did not arrive until the June following. Mr. Warham had probably but just arrived with the greater part of the Dorchester people,

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<sup>1</sup>Col. Rec. III, p. 34. Although this is practically the first limitation of town suffrage, there was, however, an early order passed to this effect, "if any person . . . have been or shall be fined or whippen for any scandalous offense he shall not be admitted after such tyme to have any voate in Towne or Commonwealth . . . until the court manifest their satisfaction." (Col. Rec. I, p. 138.)

<sup>2</sup>"Members of Newe Towne, Dorchest<sup>r</sup>, Waterton and other places." (Mass. Col. Rec. I, pp. 170, 171.)

<sup>3</sup>Mass. Col. Rec. I, p. 160.

and the Wethersfield church was organized at the same meeting of the court. Massachusetts evidently looked upon the settlement as one plantation, for she appointed for it but one constable. It was one plantation, but the conditions of settlement allowed its ready separation into three distinct towns, through the powers vested in the commissioners. But it is almost misleading to call them towns even now, for practically they were three plantations organized on a military basis. The constable at first was a military officer. The equipment was the drakes—one for each town—granted by the Massachusetts court the year before.<sup>1</sup> This step was the beginning of recognition of the triple nature of the settlement. First the towns had a military organization, then a religious organization, and last of all, an act that was not completed until the passage of the orders of 1639, an independent civil organization. For two years and a half it is extremely probable that the only civil officers were the constable, whose position was semi-military, the collectors, appointed by the court to gather the rates, the commissioners, afterwards the assistants, and the committees of the General Court who resided in the separate towns. The inhabitants must have met “in some Publike Assembly,”<sup>2</sup> for their consent was necessary in certain orders, and they elected committees to the court of 1637. The use of this term inclines us to the opinion that all strictly town matters were at first conducted by committees appointed in a meeting of the whole, and that by 1638–39 one such committee, the townsmen, had become official in its character and was annually elected. The fact that the Hartford records for the first three years were merely notes regarding land, precautions to prevent the spread of fire, provision for guard at every public meeting, and the appointment of a man to keep the bridge in repair and to do work on the highways, would seem to show that there was hardly a settled organization. These notes were undoubtedly either entered

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<sup>1</sup> Mass. Col. Rec. I, p. 184.<sup>2</sup> Conn. Col. Rec. I, p. 23.



in the book at a later day when a recorder was appointed, or transferred from jottings made at the time of the adoption of these rules.

With the beginning of the year 1639 (January 1, 1638, O. S.) we find the first mention of town officers. Hartford elected at that time four townsmen, and accompanying the record of election is an elaboration of their duties. The careful manner in which the latter is drawn up seems to point to a first election and to the fact that the towns were just beginning to get into form. This properly begins the official system, and for the present we must depend on the Hartford records, as those of the other towns are not extant. The principle of official limitation is present, so honestly maintained by Hooker in his well known sermon, and every act of these officials was watched by the people whose will they were chosen to execute.<sup>1</sup> The widening of this system consisted in the extension of these duties by town or court, the development of new powers, and the differentiation of these powers by the creation of new officers. The duties of the townsmen were soon extended. They were constituted into a court for petty cases of debt and trespass (for which, however, a separate body might be chosen if the town wished); they supervised estates of deceased persons; they took inventories and copies of wills, and performed additional supervisory duties. The first probable distribution of their powers was when a recorder was appointed. All orders previous to

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<sup>1</sup> The orders of Oct. 10, 1639, first put into shape the powers that the towns were to enjoy. That they already possessed the privileges therein contained, as Prof. Johnston maintains (*Connecticut*, p. 76), is without warrant and as a statement is indefensible. We prefer to consider the incorporation of the town to have taken place at the time of the appointing of a constable, and the orders to be the completion of the act by the General Court. It is hardly probable that Prof. Johnston has examined the town records, or he would not have been misled into making an entirely wrong interpretation of the magisterial board, "the really new point in the 'orders,'" which, though truly a new point, was not the origin of the "executive board of the towns, known as 'selectmen.'"

this were jotted down either by the townsmen or by the committee chosen to order the affairs of the town. This officer was elected in Hartford shortly after the passage of the above orders of the court, and at the same time the town voted that a chosen committee should "also inquire what orders stand in force which are [of] general concernment which are not recorded."<sup>1</sup> Undoubtedly such orders had been made without system, were not minutes of meetings, but partook of the nature of memoranda of matters decided upon in some public gathering or in a sort of committee of the whole. About the same time Hartford, following out the court order allowing the towns to choose their own officers, elected two constables for presentation to the court. At this meeting one finds a very interesting differentiation of the townsmen's duties and gradual beginning of a more extensive official system. In December, 1639, the town gave the townsmen liberty of appointing two men (one for each *side*), who were to "attend them in such things as they appoint about the town affairs and be paid at a publicque charge."<sup>2</sup> The townsmen do not appear to have chosen these men, for they were elected by the whole town at its next meeting. At that time their duties were elaborated. These two men as assistants to the townsmen were to perform many of those duties which afterwards, little by little, were to fall to the lot of specially elected officers. The record says that these men were chosen to assist the townsmen, but their principal duties were as follows: to view the fence about the common fields when requested by the townsmen; for this they were to have three pence an hour, and four pence an hour if they were obliged to spend time in repairing. This was to be paid by the owners of the broken palings. They were to survey the common fields, when appointed, with recompense of three pence an hour. If any stray cattle or swine were taken, then they were "to do their best to bring them to the pound, either

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<sup>1</sup> Hart. Rec., Dec. 26, 1639.<sup>2</sup> Hart. Rec., Dec. 23, 1639.

by themselves or any help they shall need," for which work they were to receive pay, with so much additional for every animal pounded. This was made a general duty to be performed without command from the townsmen, whenever there was need. In addition they were to do any other special public service, such as "to warn men to publick employment or to gather some particular rates or the like," for which they were to receive the usual recompense of three pence per hour.<sup>1</sup> Here we have in embryo the fence-viewer, pinder or haward, the public warner, and the rate collector. Just before this outlining of duties there had been surveyors appointed, who as their first duty had supervision of the highways. Thus in 1640 the governing body of the town consisted of two constables, four townsmen, two surveyors, and a committee of two, whose duties, partially defined, embraced such as were not performed by the others. Of these functionaries the constable and townsmen were permanent and received annual election, the surveyors were yet little more than a committee appointed for an indefinite period, with specific duties, and the body of two was but a temporary expedient, the resolution of which into fixed officers was only a matter of time.

Three stages of growth were yet to take place: a greater distribution of labor, a definite period of service, and a gradual adding of new duties such as the growth of the town demanded. Up to 1640 the simple concerns of the town of Hartford required no further oversight than that which could be given by these few officers, by an occasionally appointed committee to perform duties of a sporadic nature, and by the town as a whole. At this time the question of highways and fences comes into more or less prominence, and special committees were appointed to lay out new highways and to order the proportions of fencing. This seems to crystallize the surveyor of highways into a regular officer, and he was from this time annually elected. No additions were made to this list until

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<sup>1</sup> Hart. Rec., pp. 1, 7.

in 1643 chimney-viewers were elected. The town had established in 1635 the requirement that every house have its ladder or tree for use in case of fire, and probably the watch under the control of the constable saw that this was carried out. The chimney-viewers were at first scarcely more than a committee elected to serve till others superseded them, for new chimney-viewers were not chosen for two years. After 1645, however, they became annual officers. In the year 1643 the court ordered the towns to choose seven men (afterwards reduced to five) to give the common lands their "serious and sadde consideration."<sup>1</sup> Hartford in response elected five men "to survey the Commons and fences and to appoint according to order [*i. e.* of the court] in that case." The next year this body was apparently elected under the title of fence-viewers; at least five are elected who are so called, with no mention of any other court committee. Then, again following the order of the court, the town the next year, 1651, handed over these duties to the townsmen, with the addition of one outside member.<sup>2</sup> This step very naturally led to the next, which consisted in relieving the townsmen altogether of these duties and constituting this extra member of the board official fence-viewer. Two were hereafter elected (as required by the two *sides*), who served often two or three years in succession, and were paid out of the fines they gathered. After 1666 they were annually chosen and became established officials. No other officers were chosen before 1651. When the records of Wethersfield and Windsor usher the condition of those towns into view in 1646 and 1650, respectively, we find only

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<sup>1</sup> Col. Rec. I, p. 101.

<sup>2</sup> It is a little curious that the town order for the above is dated Feb. 4, 1650, while that of the court is Feb. 5, 1650. We suspect that in a great many cases, of which this is not the first evidence, the relation between the town and court in Hartford was much closer than in the other towns. Hartford seems to have been made a kind of experimental station before the issuance of court orders regarding towns. This would account for the backwardness of the official systems of Windsor and Wethersfield.



townsmen performing the will of the people. Though a great deal is said about fences, highways, animals, and rates, yet no mention is made of specially appointed officers to take charge of these matters. All was apparently done by the townsmen, with the committees which were occasionally appointed to assist them. We know that early in Hartford the townsmen were given control of all matters except land grants, the admission of new inhabitants, and the levying of taxes, the control of which matters was retained by the town.. It is probable that in Wethersfield and Windsor this system obtained to 1651. But with the adoption of the code of 1650, and the promulgation of a definite law ordering the appointment by the towns of certain officers, the latter began to elaborate their system. Hereafter each town elected regularly townsmen, constables, and surveyors. Windsor added chimney-viewers, fence-viewers, and way-wardens in 1654. These Hartford had already elected, but Wethersfield did not elect chimney-viewers till the next century (1708), nor fence-viewers until 1665, and then not annually until 1669. The Wethersfield townsmen were a very important body; they at first chose even the surveyors, and when in 1656 the town took the election of these officers into its own hands, they continued to choose, when needed, the pinders—whose duties were later merged in those of haward—perambulators,<sup>1</sup> and

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<sup>1</sup> *Perambulation*.—The ancient right of perambulation, or going the bounds, was in full operation in the Connecticut colony. The custom dates back very far in history, and was, in early Saxon times, attended with considerable ceremonial. The bounds of manors, and later of parishes, were fixed by trees, heaps of stones and natural marks, and the perambulation of half the parishioners from mark to mark was made yearly for the purpose of resetting the bounds if destroyed, or of reaffirming them and seeing that no encroachments had taken place. The Connecticut settlers were familiar with the old custom and early applied it, but in a less pretentious fashion than that which existed in the mother country. "When their bounds are once set out, once in the year three or more persons in the town appointed by the selectmen shall appoint with the adjacent towns to goe the bounds betwixt their said towns and renew their marks." (Col. Rec. I, p. 513.)

warners to town meeting, though these were not elected every year, and they appointed many important committees. In Windsor the town elected these men as was the case in Hart-

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The boundaries of each town were very early settled at the time the towns were named. They are rudely described, and it is no wonder that town jealousies found opportunity to dispute them. The landmarks were at first the mouths of three brooks, a tree and a pale, with east, west and south measurements by miles. (Col. Rec. I, pp. 7, 8.) This gave to each of the townships the form of a parallelogram. It is doubtful whether anything was done in addition to establishing these bounds before the passage of the code of 1650. In that document it was ordered that each town was to set out its bounds within a year, in order to avoid "jealousies of persons, trouble in towns and incumbrances in courts"; the town records show that this was carefully complied with. The proper maintenance of town boundaries has been called the symbol of free institutions, as it is the assertion on the part of the town of independence and self-respect, and the frequency of the disputes is evidence that the river towns were no shiftless upholders of their rights. Wethersfield at one time even threatened to sue the whole town of Hartford if the latter refused to send her committee to settle a disputed point (Weth. Rec., Sept. 30, 1695), and two years later actually entered on a suit; while with her neighbor on the west she was in dispute for forty years. It does not appear that in England it was the custom for parishes to join in the perambulation, but each beat its own bounds. Yet the theory of the English perambulation was carried out in Windsor, of as many as possible joining in the bound-beating. "Also men desired and appointed to run the lyne between Windsor and Hartford on the east side of the Great River from the mouth of Podang according as it was anciently run betwixt us on the west side. Mr. Newbery, Matthew Grant, John Fitch to carry an axe and a spade, and others as many as can and will" (Wind. Rec., Mar. 26, 1660), "and as many as will besides." (Mar. 11, 1668.) Each town appointed a committee, one of whom was ordered to give the other towns warning. This committee, of from two to six men, to which was occasionally added the townsmen, would meet the committee from the neighboring town on the dividing line. The joint body then advanced from mark to mark, digging ditches, heaping stones, or marking trees if necessary. This repeated every year ought to have kept the matter from dispute, and in general we may say that it did. (Weth. Rec., Mar. 8, 1653-4; Apr. 2, 1655; Mar. 24, 1658-9, etc.) Without making too much of a survival, it is interesting to note a shadow of the old English ceremonial. In the records of Windsor, liquors for bound-goers occurs year after year as a regular town expense (compare this with an entry in the account book of Cheshire, England, 1670, "spent at perambulation dinner, 3.10," Toulmin Smith, p. 522).

ford, and as they were not restrained by any general order, the nature of the officers differed somewhat both as to duties and date of first election.

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Yet the perambulators received pay in addition. (Wind. Rec., Feb. 14, 1654; Feb. 16, 1665; Stiles, Windsor, pp. 61, 161.) From the value of the liquor used, from two to six shillings, and from its character and the amount needed—a quart of rum, two gallons of cider—it is likely that another survival is to be chronicled; the Saxon stopped at each bound mark and performed a little ceremony, probably the Windsor fathers did the same in a somewhat different manner. But Wethersfield was not so lavish as her sister town, she allowed no such heathenish survival. Not one mention is anywhere made in her records of liquor for bound-goers; she ordered that her bounds “be Rund” according to court order, but that which under some circumstances would make them run more smoothly was wanting.

There must be noticed a difference in the custom as applied here from that known in England. There the idea was that careful perambulation must be made by the parish, that no sharp practice on the part of a neighbor parish should deprive it of any rightful territory. To this end a large number of the inhabitants, old and young, passed over the bounds until the entire parish had been circumperambulated. This was done independently of any adjoining town. But in Connecticut a distinct perambulation was made with each committee from the adjacent towns, covering each time only the extent of line bounding the two towns concerned. In Virginia, where the custom, under the title “processioning” or “going round,” was early in vogue, the method was more like the English perambulation. Each Virginia parish was divided into precincts, around which processioning was performed once in four years. On a stated day between September and March, two freeholders were appointed to lead the procession and to make return to the vestry by means of registry books. They were accompanied by the “neighbors” or all freeholders in the precinct, who were obliged to be present and follow. When the boundaries had been three times processioned they became unalterably fixed. It was generally the custom for neighboring precincts to perform their perambulation at the same time. (Hening’s Statutes, II, p. 102; III, pp. 32, 325–8, 529–31.) The custom did not appear in New Haven until 1683. (Levermore, p. 170.) In Massachusetts it was established by court order in 1647, and of that order the Connecticut law is an almost verbatim copy. (Mass. Col. Rec. II, p. 210.) The custom as enforced in the Plymouth colony contained the same general provisions about time, place and manner. (Plymouth Laws, p. 259.) Rhode Island, Pennsylvania, and Maryland went no further than to pass laws against the removal or alteration of boundary marks.

In nearly every case save that of townsmen, town officers were the result of an order of the court to that effect. Hartford was generally the first to respond—for it was the seat of government—to the decree of the higher power, and the other towns followed sometimes at once, often within reasonable time, though again apparently they neglected it altogether. The court had already ordered the establishment of the constable, the watch, surveyors, recorder, and fence-viewer; yet as late as 1668 it declared that adequate provision had not been made for the establishment of town officers, and passed a general law enacting a penalty in case of refusal to accept office.<sup>1</sup> This referred only to townsmen, constables, and surveyors, and had the effect of making the town service more efficient.

With the increase in the number of inhabitants and in the wealth of the communities, special officers to regulate the finances were necessary, and collectors of rates were early appointed by the court.<sup>2</sup> There were at first three rates and afterwards a fourth. When a plantation became a town it first bore its share of the country rate, which was the amount paid by each town to the colony, which was collected and transmitted by the constable; then there was the town rate, established by the town at each meeting, and paid for according to the list of estate by each inhabitant; there was also the minister's rate, levied and collected as was the town rate, and afterward there became established a school rate. The officers for the management of these rates were the lister, who made up the list of estate, and his associate, who made out the rate; the collector or bailiff, to whom the inhabitants brought their wheat, pease and "marchantable" Indian corn; and the inspector, a short-lived officer, who was to see that no estate was left out of the country list. Often the minister's and the town rate were collected by the same person, sometimes by different persons, and the townsmen had full power to call the collectors to account every year.

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<sup>1</sup> Col. Rec. II, p. 87.

<sup>2</sup> Col. Rec. I, pp. 12, 113.



In addition to these officers there were a series of others ordered to be appointed by the court and called into being by the commercial activity of the settlement. We find intermittently elected such officers as the packer of meat, brander of horses, with his brand book and iron, sealer of leather, with his stamp, and examiner of yarn, each of whom took his oath before the magistrate—the assistant or commissioner—and received as pay the fees of his office. Then there was also the sealer of weights and measures, the standard of which was originally procured from England; sometimes the court appointed these latter officers, but more often the town elected them. By way of special functionaries there were the public whippers, the cattle herders, sheep masters, tithingmen, ordinary-keepers, and, of the military organization, the ensign of the train band. In the year 1708 the following was the list of officers chosen in Wethersfield: town clerk, selectmen, constables, collectors for the minister's and town rate, surveyors (two for the center, one for Rocky Hill, and one for West Farms), fence-viewers (two for the center, two for Rocky Hill), listers, sealer of measures, leather sealer, chimney-viewers, hawards, and committee for the school. The office of town-warner and town-crier had for some time been obsolete, for the court ordered the erection of a sign-post in 1682.

For the satisfaction of justice there was ample provision. As early as 1639 the townsmen had been authorized to sit as a court for the trial of cases involving less than forty shillings. Cases of debt, of trespass, little matters of dispute between inhabitants, with damages paid in Indian corn or rye, are to be found in the Windsor records. It is probable that the other towns had the same court, though there is no record of it, for the Particular Court of the colony had no trials for less than forty shillings. This was superseded in 1665 by the commissioner, to whom was given "magistratical" power. To aid him and to preserve the number of the former town court, Wethersfield twice, in 1666 and 1667,

elected a body which she called "selectmen," but after that evidently the commissioner acted alone. In 1669 a court was ordered to be erected in the towns, consisting of the commissioner, assisted by two of the townsmen; these three acting with the assistant formed a court of dignity, more worthy to inspire respect and moderation on the part of offenders. It was, however, short-lived, and though Windsor has record of it in 1669, we hear nothing more of it. The judicial duties now devolved entirely on the commissioner, until he was superseded in January, 1698, by the Justice of the Peace. Appeal to the Particular Court, and later to the County Court, was allowed, but not encouraged.

Lawyers as we understand them were not in existence. But many a man in the colony had the requisite qualifications, with perhaps a smattering (or more, as in the case of Roger Ludlow) of law, and he only required to be clothed with legal power to bring or resist a suit. This authority was conveyed by letter of attorney, which was a document signed by the plaintiff or defendant and duly witnessed. Such a letter would be given to one person or more, and when a town wished to bring suit it empowered the townsmen to plead and manage the case themselves, or instructed them to constitute others as attorneys acting under them, to whom they were to give letters of attorney.<sup>1</sup> Debts were collected in the same way.<sup>2</sup> Sometimes in more personal cases arbitration was resorted to, in which case two (and if they could not agree, three) would be chosen, and a bond of so many pounds put up, which was forfeited by him who failed to abide by the judgment of the arbitrators.<sup>3</sup> Committees were appointed for the same purpose for a limited time to hear cases of complaint, to be reported to the town, who reserved the right to pass judgment.<sup>4</sup>

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<sup>1</sup> Hart. Rec., May 13, 1678; Weth. Rec., Dec. 17, 1762.

<sup>2</sup> Hart. Book of Distrib., p. 544.

<sup>3</sup> Weth. Land Rec. III, p. 3; Stiles, Windsor, p. 65.

<sup>4</sup> For a very interesting case of this kind see Weth. Rec., Mar. 4, 1701-2.

## TOWNSMEN.

After this bird's-eye view of the town official system, an examination into the constitution and growth of the most important body of all, the executive board of townsmen, will give us an idea of the practical working of the town machinery. The first appearance of this body in the Hartford records of January 1, 1638 (1639), shows it to us in no process of development, as was the case elsewhere,<sup>1</sup> but full grown, with qualified powers, undoubtedly the result of previous experimentation. At a meeting held January 1, 1638-39, two weeks before the "11 orders" were voted, it was ordered that the townsmen for the time being should have the power of the whole to order the common occasions of the town, with, however, considerable limitation. They were to receive no new inhabitant without the approbation of the whole; could make no levies on the town except in matters concerning the herding of cattle; could grant no lands save in small parcels of an acre or two to a necessitous inhabitant; could not alter any highway already settled and laid out; in the calling out of persons and cattle for labor they must guarantee in the name of the whole the safe return of the cattle and a reasonable wage to the men, and should not raise wages above six pence per day. They were required to meet at least once a fortnight, for the consideration of affairs, and for arranging the proper time for the calling of a general meeting, and for absence from such meeting they were to be fined two shillings six pence for every offense.<sup>2</sup> The next year it was voted that once a month the townsmen should hold an open meeting, to which any inhabitant might come, if he had any business, at 9 o'clock in the morning of the first Thursday in the month; and that no order as passed in

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<sup>1</sup> The townsmen of Dorchester, Mass., furnish a good example of such a development. Dorchester Rec. pp. 3, 7; in 4th Report of Boston Record Commission.

<sup>2</sup> Hart. Rec., Jan. 1, 1638.

the townsmen's meeting was to be valid until it had either been published at some general meeting or reported to the inhabitants house by house, or read after the lecture. If any one, on being warned, failed to stay to listen to the order, he could not plead ignorance of the law, but was liable for its breach.<sup>1</sup> The type of townsmen in 1638-39 was little different from that found in later years.<sup>2</sup>

The value of such a system would seem to be patent to every one, but it is specially interesting to find the colonists' own reasons, expressed a few years later, as to the principles on which the functions of townsmen were based. In 1645 the town (Hartford) voted that persons refusing to respond when called out by the townsmen to work on the highways should be fined. Evidently an unrecorded protest was made against giving the townsmen so much power, for on the next page appears a study of principles which is worthy, in its relation to the town, to stand beside Hooker's sermon in its relation to the commonwealth. The "Explication" reads thus:

"Whereas in all communities & bodyes of people some publique workes will occur for the ordering & managing whereof yt hath ever beene found necessary & agreeable to the rules of prudence to make choice of p'ticular p'sons to whome the same hath been comitted whoe both with most advantage to the occasions & least trouble & inconvenience to the whole may oversee & transact such affayres: And

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<sup>1</sup> Hart. Rec., Jan. 7, 1639.

<sup>2</sup> The error often made regarding the origin of the Connecticut townsmen, ascribing the beginning of the townsmen system to the magisterial board or town court instituted by the General Court in October, 1639, seems to be due to the indexing of this board in the printed records of the colony under the heading "Townsmen." Dr. Levermore, in his *Republic of New Haven*, p. 72, note, as well as Prof. Johnston (*supra*, p. 94, note), falls into the error. As we have seen, the decree of the court had nothing to do with the establishment of even prospective townsmen, for they already existed, with functions almost identical with those performed by the townsmen of the later period.



accordingly yt is w<sup>th</sup> us usuall (the beginnings in w<sup>ch</sup> we are p<sup>r</sup>esenting many things of that natuer) to make choise of some men yearly whome we call Townesmen to attend such occasions. But yt is easily obvious to evry apprehension that unles w<sup>th</sup> the choise of y<sup>m</sup> to the place power be given for the manageing & carring on of the same their indeav<sup>rs</sup> wilbee fruitless & the publique nessesarily suffer; It is therefore by general consent ordered that in all occations that doe concerne the whole and is comitted to the care & oversight of the townesmen yt shal bee lawfull for them or anie twoe of them to call out the teames or p<sup>r</sup>sons of anie of the inhabitants, the magistratts & officers of the church in their owne persons only excepted for the mannaging & carring on of such occasions wherin yet they are to use the best of their descretion not to lay such burthens on anie as to destroy the p<sup>r</sup>ticular but soe farr as the natuer of the occation under hand will in their judgments w<sup>th</sup>out disadvantage p<sup>r</sup>mitt to attend as neare as may be a p<sup>r</sup>portion according to the interest ech hath in the whole.”<sup>1</sup> In this declaration is contained the fundamental idea of town government: the election by the body of those who are to order its affairs, the investing these when elected with power for the proper performance of their duties, and the implied responsibility in the use of this power. There lies in the latter factors all the difference between good representative government and bad representative government, between the Constitution and the Articles of Confederation. It is an outcropping of the spirit which framed the Fundamental Articles. A clause which follows the above vote declares that if any partiality be shown by the townsmen, the aggrieved person might appeal to the whole town, or if not then receiving satisfaction, might carry his case to the “publique justice in the place,” thus making the law a court of higher appeal than the people.

The number of men for this purpose chosen has differed

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<sup>1</sup> Hart. Rec. I, p. 37.

greatly in different colonies and towns. In Massachusetts, bodies of twenty were elected to order affairs, of whom seven could bind the people.<sup>1</sup> In some towns twelve townsmen are recorded,<sup>2</sup> but as years went on a reduction took place, and we find the number gradually lessening to nine, seven, five, and three. In New Haven the number was ten, afterwards reduced to seven. In the Connecticut colony it varied. Hartford regularly had four; Wethersfield in seventy years elected twenty-six bodies of five, twenty-nine bodies of four, and fifteen bodies of three; the Windsor number was at first seven, afterwards five. The object for which they were elected has been already dwelt upon. The records generally phrase it "to order the town's occations for the year," "to agetat and order the townse occasions for the present year." These occasions were far more extensive than is now the case. Town affairs included church affairs, and in those three little communities great were the religious agitations. The more important matters, such as building the meeting-house, settling a minister or a controversy, were put into the hands of a special committee, but the townsmen cared for and repaired the meeting-house, and had charge of those chosen by town vote for sweeping, dressing, underdaubing and clapboarding the building, and generally saw to the construction of porch, seats, and pulpit. At that time much was passed upon by people in town-meeting which would now be decided by the selectmen at their own meeting, on the strength of the power vested in them by law. But there was then no law determining the exact nature of their office. Each town measured the proper limitations of its own townsmen, and one may say that the townsmen did everything for the performance of which no one else was appointed. Often these powers varied year by year. In carrying out their functions the townsmen often, though by no means always, wrote out the orders

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<sup>1</sup> Blake, *Annals of Dorchester*, pp. 13, 14.

<sup>2</sup> Watertown and Boston.

already arranged in their own meeting, drawing them up in the proper form. These were presented at the general meeting, when they would be accepted or not as the inhabitants pleased, for the latter had always the power of vetoing the projects of their agents if they did not approve of them.

The modern town treasurer is an important differentiation of the townsmen's powers. This is not the place to speak of the nature of the rates or the method of raising them. Suffice it to say that the control of all expenditures, whether for church, town, or school matters, was in the hands of the townsmen. They never collected the rates. For this purpose a committee or special officer was chosen, but it was through the townsmen that the regular expenses of the town were met. Under such heading there seems to have been included such items as paying the herders, watch, drum-beaters, building and repairing bridges, setting the town mill, surveying lands, repairing the minister's house, payment of minister's salary, occasionally supporting indigent persons, repair of town property, as guns, ferry (in Windsor), town stocks, etc., payment of bounties for wolves and blackbirds, payment of town officers, and such extra expenses as "Townsmen dining with magistrates" and "liquor for boundgoers." Of course this is an imperfect list, yet it gives an idea of town expenditure in the last half of the seventeenth century. Every year the town voted a certain amount for the past year's expenses, and it is worthy of notice that difficulties over financial matters were not so frequent as we might have expected. Yet, though the townsmen were hard-headed economists, they do not always appear to have been systematic and prompt in squaring their accounts and handing over the surplus to the newly elected officers. There was no law, as now, requiring that an annual statement of receipts and expenditures be made and laid before the town at their annual meeting. It was customary to do so, but there was at times a curt independence about the old townsmen-treasurers which would not brook too close supervision. Their honesty placed

them above giving bonds, or obeying laws which seemed to question their honor.<sup>1</sup>

The townsmen gradually changed into the selectmen. This name does not appear in Hartford and Windsor before 1691, and from that time for a period of twenty-five years there is a curious commingling of the two terms. The title "selectmen" was often used in recording the election, but the town clerk still clung to the good old name, and we find "townsmen" in the minutes of further proceedings. But there is plenty of evidence to show that the terms were used synonymously. Wethersfield employed the term in a very confusing fashion. It first styled two town courts established in 1666 and 1667 "selectmen," and in 1679 and 1681 again used the term for a distinct body; it is evident, from the nature of the latter's duties, that they were connected with the granting and receiving of certificates of freemanship. The establishment of this body seems to have been the following out of an order of the court in 1678, in which selectmen giving false certificates were fined £5.<sup>2</sup> Wethersfield immediately elected for this purpose an extra body—first of four members, then of three—who performed this service, and because, from their position, they needed to have a familiarity with the list of estate, they were, in 1679, given the duties of listers and rate-makers. But in a few years the term had become confused with that of townsmen, and the fact that the name selectmen was already in use and further established by the laws of Andros in 1688, to which Wethersfield, at least, very duti-

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<sup>1</sup> In seventy years in Wethersfield seventy-four men held the office of townsmen, with an average of four elections to each. Of these seventy-four, thirty held office over four times, with an average of six elections to each; fourteen held office over six times, with an average of eight elections to each; four held office over eight times, with an average of ten elections to each; and the most befunctionaried individual served as townsman eleven times, while only fifteen held office but once. (Weth. Rec. 1646-1716.)

<sup>2</sup> Col. Rec. III, p. 24.



fully responded,<sup>1</sup> brought it into common use, and after 1725 it was the commonly accepted term.

#### CONSTABLES.

The appointment of a constable in Connecticut was the affixing of the official seal to a town, and was done without exception, though in at least two instances (Simsbury and Derby) the court appointed the constable before the settlements petitioned for town privileges. He was the right arm of the law, and the channel through which the court communicated with the towns, and frequent were the orders to constables by the court.

The first constables appointed for the river towns were of a decidedly military character. They rather resembled their English prototype than the officer of later colonial days.<sup>2</sup> The first independent organization of the towns was for defense. The earliest act of the provisional government was directed against a laxity of military discipline, and the next forbade sale of arms, powder or shot to the Indians; following which is the appointment of constables, practically as military officers. A further extension of the armed organization is seen in the watch, undoubtedly a kind of constabulary patrol to guard against Indian attacks. The constable was next required to view the ammunition, which every inhabitant was ordered to have in readiness, and finally, before half a year had passed, each town was put into working military form by the institution of monthly trainings under the constable, with more frequent meetings for the "unskillful." At this time the constable was required to perform his time-honored duty of viewing the arms to see "whether they be serviceable or noe," which duty was later given to the clerk of the train band. One is not surprised that the colonists

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<sup>1</sup> Weth. Rec., May 21, 1688.

<sup>2</sup> For the military character of the constable see Adams, *Norman Constables in America*. J. H. U. Studies, vol. I, pp. 8 ff.

were in readiness the next year to declare an offensive war against the Pequots.<sup>1</sup> After the war was over the inhabitants were ordered to bring to the constable "any Armor, gones, swords, belts, Bandilers, kittles, pottes, tooles or any thing else that belongs to the commonwealth," and this officer was to return them to the next court.<sup>2</sup>

But after this need of special military jurisdiction was passed and Captain Mason was appointed general training officer, the constable's duties became of a purely civil character. Such were first outlined in the code of 1650. But without reference to that code, his duties, as the records declare them, were as follows: He was obliged to take oath after his election by the town before a magistrate or assistant. He collected the country rate and transmitted it to the colonial collector, afterwards the treasurer (1708). He warned the freemen to attend their meeting when deputies were chosen, and, in Windsor at least, warned for one town meeting yearly. At this meeting he read to the inhabitants the "cuntry laws" or orders of the General Court passed during the preceding year, and declared to them the amount of the country rate. At this meeting his successors were chosen as well as other town officers. He controlled the watch and executed all commands of the court or warrants from a magistrate. He broke up tipplers, raised the hue and cry (of ancient lineage), and could summon other inhabitants to join in the pursuit. He also passed on objectionable personages to the constable of the next town, who continued the process until Sir Vagabond reached the town that owned him. This was one way of disposing of intruders. He was an officer that inspired awe. Yet notwithstanding this, the office was not one greatly sought after; its duties were arduous, and many a man preferred to pay his forty shilling fine than to serve.<sup>3</sup>

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<sup>1</sup> Col. Rec. I, pp. 1, 2, 3, 4, 9.

<sup>2</sup> Col. Rec. I, p. 12.

<sup>3</sup> Dr. Stiles, quoting a Windsor record of 1661, where "after much contending" constables were chosen, concludes that the office was in great

Besides this functionary, some of the towns had a kind of petty constable, who guarded the commons to prevent neighboring townspeople from carrying off timber, fire-wood, stone, etc. He was, however, a town officer, and his election does not appear to have been ordered by the court.

### TOWN MEETINGS.

In comparing the records of the different towns and colonies, one is struck by the bareness, the brevity and narrowness in scope of the minutes of meetings of the Connecticut settlers. There is little doubt that what we have represents the gist of the proceedings, and not only does the subject-matter show us that questions of necessity alone were discussed, such as related to the existence of the town and church as a corporate body, but the record of such discussion is embraced in the simple statement of its result as embodied in a town order. There is little flesh on the bare skeleton of facts, little color to lighten up the sombre monotony. Here and there an unconscious bit of phraseology or an exceptionally lively subject naïvely treated by the recorder, gives a hint of the activity which lay behind the formal phrases, and a realistic peep into the life of the people. But any attempt to portray the daily social and business life of the people of the early colony would be a difficult task.

The town meeting was held at first monthly, but, with the growth of the town, the meetings during the summer months were held less frequently, and at times were apparently dropped altogether, except in case of special call. The autumn and winter meetings were of the greatest importance, for at these officers were elected, rates proclaimed and laws read. During the seventeenth century the different officers were not always elected at the same meeting, though such

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demand. It may have been at that time, but after 1675 it was not. Hartford and Wethersfield had plenty of cases of refusal and payment of fine. In 1691 seven men were elected one after the other, and each refused to take the office. (Weth. Rec., Dec. 28, 1691.)

was the case with the more important. The town-meeting was generally called together by the beating of the drum or blowing of the trumpet from the top of the meeting-house, in a manner made clear by the following: "determined that provision should be made upon the top of the meeting-house, from the Lanthorn to the ridge of the house, to walk conveniently to sound a trumpet or drum to give warning to meetings."<sup>1</sup> This was employed for all meetings, on Sundays and lecture days as well. There were also warners, who went from house to house in Wethersfield, giving notice to the inhabitants. These inhabitants generally came together at 9 in the morning, and at first fines were imposed for absence, but this seems to have fallen into disuse. When the inhabitants were assembled, a moderator was appointed and business begun. The nature of the orders passed upon will have been gathered from what has already been said, and it is unnecessary to enlarge upon it here. There was no interference with private concerns, no sumptuary legislation, no votes touching on the morals or religious opinions of the people. What little of this sort was to be done in the colony was reserved for the General Court. Town officers were generally elected by ballot, though at times, for "dispatch of business," it would be voted to elect them by hand. General orders were passed by majority of hands held up, and in case of a vote for minister where a majority was certain to be in favor, a raising of hands was all that was necessary. Such meetings were after 1700 held quarterly, and later semi-annually, and now annually,<sup>2</sup> always, however, subject to a special call. In addition, there are scattered here and there among the minutes of town-meetings, records of constable's (freemen's) meetings and meetings of the townsmen.

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<sup>1</sup> Wind. Rec., Dec. 13, 1658.

<sup>2</sup> The present law is that town-meetings shall be held annually some time in October, November, or December, and special meetings may be convened when the selectmen deem it necessary, or on the application of twenty inhabitants. Town-meetings may, however, be adjourned from time to time, as the interest of the town may require.



## RATES AND FINES.

The financial system of the towns was of a simple order, and few difficulties arose of a specially troublesome nature. In the beginning there was but one rate or tax levied on all the inhabitants by the town, which covered all the debts contracted of any nature. The creditors presented their accounts generally at the February meeting, and a rate was voted to cover them. Before 1688 the amount of the rate was stated as so many pounds, which was apportioned among the inhabitants for payment, but after that time the town voted a tax of so much on a pound, as "one half penny and one farthing on ye pound," "one penny farthing upon the pound." This covered the ordinary expenses. Those of an extraordinary nature, such as building a bridge or a meeting-house, seem to have been met by a special rate laid by the town, though all repairs were included among the regular town debts. But very soon there was separated from this general rate—and it was the first step in the separation process—the minister's salary, which was voted in the lump—so much for the minister and so much for his assistant, if he had one. For the collection of this a special officer was chosen, and all the people were taxed in proportion to their list of estate. This list was carefully made out and published from house to house. In addition to the rate, the minister was given on his settlement a grant of land, a certain share of the mill tolls, and his land was voted free from taxation. It is probable that he was paid semi-annually, once in September and again in March. Windsor tried for many years the system of voluntary subscriptions, appointing a committee to go from house to house to find out what each would give. This scheme was continued many years.<sup>1</sup> In 1680 the general statement was made regarding the whole colony—including, of course, New Haven—that nowhere was the minister's rate

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<sup>1</sup> Wind. Rec., Nov. 11, 1662; Stiles, Windsor, p. 153.

less than £50, and in some towns it was as high as £90 and £100 a year.<sup>1</sup>

As early as 1642, Hartford voted £30 to be settled upon the school for ever,<sup>2</sup> though we cannot say that Wethersfield or Windsor made provision so early. In the latter town, in 1658, there was allowed out of the town rate £5 for the schoolmaster. Wethersfield the same year makes her first recorded provision somewhat more liberally. The first schoolmaster was to receive £25 for his teaching. A house and land was allowed him, but of the £25 the children were to give him eight shillings apiece and the town to make up the rest. Three years after the town appropriation was £8 and that of Windsor reduced to £4 10s. The payment by the scholars was at first by such as went to school, later all boys between five and ten years were taxed, "whether they go to school or not," and we find that all who sent children to school in winter between September and April were each to send a load of wood to keep them warm. Thus the provision for the school was at first twofold—appropriation by the town and payment by the scholars. Later, as the teacher received a definite amount, the town stated exactly how much it would give, and the remainder was made up by the scholars. This became the school rate, and every child between six and twelve was taxed according to the length of attendance. Servants taught were paid for by their masters. In 1701 a third source of supply was provided in what the records call the "cuntry pay," that is a tax of forty shillings laid on every thousand pounds of estate, collected by the constable, and handed over to those towns which maintained their schools according to law. This was the beginning of state support. The townsmen controlled all school matters either in person or by appointed committees, which became a regular official board about 1700. This system of town control lasted till the first quarter of the eighteenth century,

<sup>1</sup> Col. Rec. III, 300.

<sup>2</sup> Hartford Rec., Dec. 6, 1642.

when, with the separation of town and parish, the control of school matters fell into the hands of the ecclesiastical societies. Again a change was made with the system of dividing the town into districts, and the control is now in the hands of regular district committees, though there is a tendency to centralize the management by the institution again of town committees with general supervisory power.

In addition to these regular rates there were others of a minor and intermittent character ; the seat rate, which corresponded to the present custom of sale of pews, with this difference, that as each was assigned his seat by a committee, he paid what he was told, and many worked off this rate by laboring for the town ; the meadow rate for building the common fence ; the watch rate, and other lesser ratings for unusual appropriations.

Many of the town and state expenses were met by fines. If the towns used whipping or the stocks, as did the court, their use is not recorded.<sup>1</sup> But fines were of regular ordering. There were fines for everything that the town forbade : for elders, briars or weeds in the highway, for leaving the meadow gates open, for neglecting fences, for having unruly cattle or runaway swine, for carrying off timber, from outsiders for felling trees, and from inhabitants for not working on common or highways ; in fact for all neglects of town orders. Officers were fined for neglect of duty and for refusing to serve when elected.

Payment of all debts, of rates and of fines, was at first entirely in kind. Wheat, pease and Indian corn, sound, dry and well dressed, were employed, and rye came into use a little later. By 1695 the inhabitants were allowed to pay half in current money of New England, and soon this was extended to the privilege of paying all the rates in current money. But the depreciation of the currency was such that

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<sup>1</sup> The towns certainly had stocks. The court ordered each town to have a public whipper. But there is no record that the towns used these for themselves. Perhaps they carried out the court orders.

by 1698 money would be taken at only two thirds of its face value. All money accounts were kept in pounds, shillings, pence and farthings, and a regular schedule of prices was made every few years, determining the value of the different qualities of grain. Smaller amounts, such as mill and ferry tolls, were probably paid in wampum at three, four and, later, six for a penny. The nature of the commodities was such that they were brought to the collector's house, which served as a sort of town treasury, and the town paid its debts from this fund.<sup>1</sup> The accounts of these collectors were often loosely kept, and the townsmen had difficulties in squaring accounts with them, for rates were difficult to collect, particularly in hard times, and the inhabitants were often in arrears. It was not until the end of the century that the collectors made annual reports and town finances were put on a systematic basis. Even the townsmen themselves did not always keep accounts in good order, and their successors in office often found affairs very mixed, though the towns differed in this according to the financial ability of their officers. Windsor apparently had the most conscientious officials. This town had a somewhat thorough way of dealing with her debtors. If the rate-payer did not hand in his due within reasonable time after the rate was published, a committee was appointed by the townsmen and given a note of the amount due. This committee was ordered to go to the houses of the delinquents, and, as the record says, "if they can find corn they shall take that in the first place, but if not, then what of any goods that come to hand (and give the owners three days liberty after to carry in the debts and withal 2d. in a shilling over and above the true debt or rate which belongs to them that distrayne towards their labors according to the order of the Court) and if they neglect to redeem the goods distrayned, that then they shall get it

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<sup>1</sup> Windsor had a "Town Barn" built for this special purpose. Stiles, Windsor, p. 125.



prized by indifferent men and sell it and pay the debt and themselves and return what remains to the owners.”<sup>1</sup> This is interesting as showing the way in which the towns applied the court orders, and how faithfully they worked in harmony with the policy laid down by the General Court in regard to all town matters.

#### TOWN AND COLONY.

We have now considered in some detail the characteristic features of the agrarian and civil life of this sturdy people. It was not essentially different from that existent among the other New England towns; such life was in its general features everywhere the same. On close examination, however, we find that the machinery of town and court administration can be classified as to whether it is pure or mixed, simple or complicated, natural or artificial. To Connecticut belongs the best of these conditions. Her town life was pure, simple and natural; the law which guided her political relations was nearer to the law which governs to-day than anywhere else on the American continent. We are apt to think of her settlement as an artificial importation, as one ready-made through the influence of pre-existent conditions. On the contrary, it was a natural growth; it passed through all the stages of gestation, birth, and youth to manhood. Beginning with the commercial stage, when trade was the motive power, it soon entered the agricultural stage, when the adventure lands were occupied by planters. With the development of this phase of its growth the military stage begins, when it became necessary to systematically arm against the Indians, and to turn the agricultural settlements into armed camps, with the people a body of trained soldiers. At this stage the organized religious life begins, when systematic church life arises with the infusion of new settlers; and last

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<sup>1</sup> Wind. Rec., Dec. 10, 1659. For “the order of the Court,” see Code of 1650, Col. Rec. I, 550.

of all is reached the civil or political stage, when for the first time the settlements may be fairly called organized towns. Now with these five factors—commercial, agricultural, military, religious, political—all active elements in the structural unity of the towns, we can understand why the need of some more exact and authoritative scheme of government was felt, and why the constitution of 1639 was adopted. We can also understand why such a document had not been drafted before; it was not a constitution struck off at one blow, but was in every article the result of experience. Two years previous the General Court had met, and without other right than that of all men to govern themselves, began to legislate in matters of general concern; the state dates its birth from this date. But not until the inhabitants composing that state had become accommodated to the new situation, and the separate settlements had become sufficiently developed to be used as units for popular representation, was a general system of government framed. We have said that every article in that constitution was based on experience, either in Massachusetts or Connecticut; the document as finally drafted was the result of the trial by democracy of itself. The people were experimenting, and as they experimented, the towns were growing and the state was taking shape. The very title “committees” of the first representatives is a clue to the yet unformed condition of the towns. This committee bore no distinctly official character, but was probably chosen by the people of the town—for as yet the principle of freemanship had not been established—to represent themselves, not the town, in the body which was to try the experiment of legislating for a self-governed community. Can we doubt that each town was managing its own affairs by committees of a not essentially different character from those sent to the General Court? It is at least a significant fact, that within an interval of two weeks preceding the crystallization of the state experiment in a written constitution, Hartford, the only town of which we have record, formulated the plan for its

permanent government, by the election of townsmen, and, what is more significant, by setting bounds and limitations to their power in seven prohibitive orders. Had not the people been experimenting in town government as well as state, and is it surprising that the permanent organization of the one almost exactly coincided with the permanent organization of the other? Far be it from us to take without warrant an attitude antagonistic to an historian who has done so much for Connecticut history, and whose political discernment is so superior to our own, but the whole bearing of this study has been to convince us that Prof. Johnston's theory that in Connecticut it was the towns that created the commonwealth; that in Connecticut the towns have always been to the commonwealth as the commonwealth to the Union, is entirely untenable. If Hartford, in every way the most precocious in rounding out her town system, did not begin that system till 1639 (N. S.), there is no doubt that the other towns, which in 1650 had but the beginnings of an official town system, were even later in development. How then can towns with an as yet hardly formed government, receiving and obeying orders from a central authority, their only permanent officers the appointees of that authority, be said to have sovereignty and independence? There were not three sovereignties, but one sovereignty, and that lay with the people. These people in their position as settlers in separate localities, and through those acting for them in the General Court, effected the erection of these localities into legal towns; and though these towns were used as convenient channels of representation and taxation, they never, either before or after the constitution, had complete local independence. As there were no sovereign towns, there could be no pre-existent town rights; such rights lay with the people, and they gave them up with but one reservation, as has been already stated in the first chapter. This constitution was not the articles of a confederation, although the people entered into "combination and confederation," in

which the peculiar nature of the settlements was recognized; but it was a government to order the "affairs of the people," "gathered together," "cohabitting and dwelling in and upon the River of Conectecotte and the Lands thereunto adjoyning," to which government was granted "the supreme power of the commonwealth." Compare this expression with that in the first article of the Constitution of the United States, where the very phrase, "All legislative power herein granted," shows at once that the framers never considered the supreme power as belonging to the central government they were creating.

In turning from the historical to the legal aspect of the question, the discussion may be brief. This act of the people of Connecticut has been the basis of all judicial decisions. Two quotations will show the drift of such interpretation. In 1830 Chief Justice Daggett decided that the towns "act not by any inherent right of legislation, like the legislation of a State, but their authority is delegated."<sup>1</sup> Still more pertinent is the decision of Chief Justice Butler in 1864, who, referring to the surrender of power, says, "That entire and exclusive grant would not have left a scintilla of corporate power remaining in themselves as inhabitants of the towns, if any such had then existed"; and again, "And thus their powers, instead of being inherent, have been delegated and controlled by the supreme legislative power of the State from its earliest organization."<sup>2</sup>

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<sup>1</sup> Williard vs. Killingworth, 8 Conn. Reports, p. 247.

<sup>2</sup> Webster vs. Harwington, 32 Conn. Reports, pp. 136-139. Both of these cases were quoted by Roger Welles, Esq., in the *Hartford Courant*, Aug. 27, 1888, and will suffice for the argument in the text, but enlargement in a note may not be without profit. More fully, Chief Justice Daggett's opinion is as follows: "The borough and town are confessedly inferior corporations. They act not by any inherent right of legislation, like the legislature of the State, but their authority is delegated, and their powers therefore must be strictly pursued. *Within* the limits of their charter their acts are valid, *without* it they are void." July, 1830. The Webster vs. Harwington case was argued by Governor (now Judge) Andrews in 1864, who took the ground "that in a democratic govern-



So much, then, for the historical and legal side of the case. How was it in practice? Were the towns in Connecticut "almost as free as independency itself until near the period of the charter," as Prof. Johnston says, or were they controlled by the supreme legislative body of the state from

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ment, ultimate sovereignty resides with the people; the simplest municipal organization, viz. the towns, being the most purely democratic and voluntary, possess all power with which they have not expressly parted." This is the claim that Prof. Johnston makes of reserved rights in the towns. Chief Justice Butler in answer says, speaking of the Constitution of 1639, "That extraordinary instrument purports on its face to be the work of the people—the residents and inhabitants—the free planters themselves of the three towns. It recognizes the towns as existing municipalities, but not as corporate or independent, and makes no reservation, expressly or impliedly, of property or legislative power in their favor." (p. 137.) Again, in referring to the historical authorities quoted by the plaintiffs he says: "These views" (that the towns gave up a part of their corporate powers and retained the rest in absolute right) "have been expressed by [the historians] without sufficient reflection or examination, and are not correct in principle or sustained by our colonial records or by any adjudication of our courts" (p. 136). He also says, in speaking of the orders of October, 1639, which Prof. Johnston refuses to accept as anything more than a defining of privileges already possessed, and not as an incorporation or chartering of the towns (p. 76): "Now that provision enacted by the General Court in 1639 was both a grant and a limitation of vital power, and was intended to embrace towns thereafter created (as they were in fact) by law, and is utterly inconsistent with the idea of a reserved sovereignty, or of any absolute right in the towns and constituted the towns corporations, and the continuance of it has continued them so; and that provision, with the numerous special provisions then and since made, prescribing their officers and regulating their meetings and other proceedings, and imposing and prescribing their duties as subordinate municipal corporations, constitute their charters." Then follows the second quotation in the text (p. 139). For further similar judicial opinions see *Higley vs. Bunce*, Conn. Rep. 10, 442; *New London vs. Brainard*, Conn. Rep. 22, 555. In these cases there was no dissenting voice against the opinion of the Chief Justice by the associate judges of the Supreme Court. The suit of *Webster vs. Harwington* had already been decided by Judge Sanford in the Superior Court, against the theory of reserved rights. The attitude of Massachusetts and New York toward their towns is exactly the same. *Bangs vs. Snow*, Mass. Rep. I, p. 188; *Stetson vs. Kempton et al.*, Mass. Rep. 13, p. 278; Statutes of 1785, ch. 75. For New York see *Hodges vs. City of Buffalo*, 2 Denio, p. 110; Revised Statutes I, p. 599, secs. 1, 3.

their earliest organization, as has just been quoted? The court almost at once, in the August or September following the adoption of the constitution, took measures to complete the organization of the towns, through the agency of a court committee appointed for that purpose, and on the presentation of their report, in the October following, passed the orders which they had drawn up. In these orders and those frequently passed afterward—we are speaking of the period preceding the charter—can be found all the rights that the towns were possessed of. Every officer chosen except the townsmen can be traced to these orders, as well as every privilege exercised of which the town records give us knowledge. The allowance was liberal, and the towns never exceeded, and in some cases did not wholly exhaust, the powers granted them. Even within these orders the court occasionally interfered. It ordered regarding highways, fences, and unruly animals; decided the boundaries of the towns, refused the right of town suffrage to such as had been whipped or fined for scandalous offenses; even made grants of town lands; settled the ferry rates of Windsor, gave orders to her deacons; interposed in the ecclesiastical affairs of Wethersfield; ordered the establishment of town inns; commanded the payment of bounties, and showed its authority in many other similar ways. It also controlled all the military and commercial affairs of the towns. In other words, the General Court directly controlled all matters not expressly delegated to the towns, and even in those matters it interfered, though rarely. That this was as true in practice as in theory, a careful study of the town records enables us to affirm.

What an actual reservation of rights was may be seen in the case of Southhampton, which, settled in 1640, came under the jurisdiction of Connecticut in 1644. As for these four years it had been an independent church-state, it had some right, made more decided by its peculiar situation on Long Island, to introduce into the agreement a distinct reservation

of power. Its inhabitants were given "liberty to regulate themselves according as may be most suitable to their own comforts and conveniences in their own judgment," and power was reserved for all time "for making of such orders as may concerne their Towne occations."<sup>1</sup> This, by force of contrast, makes clear how different the position of the river towns actually was in the eyes of the court.

Nor did the towns themselves fail to recognize this position of complete subordination to the General Court. It might be sufficient to say, as substantiating this, that they never overstepped their boundaries, but a concrete expression of their opinion is more conclusive. Windsor was much troubled because the people neglected their fences, from which many complaints had resulted, and says "that we cannot but see it the cause of many trespasses and discord among neighbors, and therefore, as we should desire and endeavor the peace and comfort of one another," it proceeds to regulate the matter, adding almost parenthetically: "The court having left the care and ordering of things of this nature to the care of the townsmen in the several towns."<sup>2</sup> If this was the situation up to the time of the charter, much more was it so in the period following, when, with the growth of towns and commonwealth, colonial organization became more complicated and new conditions were constantly arising. That

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<sup>1</sup> Col. Rec. I, p. 567, Appendix II. Compare the historic beginnings of the Connecticut towns with those of Rhode Island, of which it can be truly said, as does the historian of that State, "In Rhode Island each town was itself sovereign, and enjoyed a full measure of civil and religious freedom."—Arnold's Hist. of Rhode Island, I, p. 487.

<sup>2</sup> Wind. Rec., March 21, 1659. The only instance that the writer can find of an unwillingness to obey a court order was when the court, apparently unjustly, refused to ratify the election of Mr. Mitchell, a weighty landholder of Wethersfield, who had been elected to the office of Recorder. The court declared the office vacant and ordered a new balloting. The town refused compliance, and Mr. Mitchell entered upon his office. In answer to this the court promptly fined him twenty nobles, and that part of the town which voted for him five pounds.—Col. Rec. I, pp. 40, 51–52.

town and court relations had not changed it is almost unnecessary to state.<sup>1</sup> To attempt to prove it by example would be tedious and add little that was new. It may all be summed up in two quotations, which bring into sharp contrast the relation of the town to the colony, as compared with that of the State to the American Congress. When East Hartford wished the liberty of a minister in 1694, Hartford, though loath to part with "their good company," yielded gracefully and said, that "if the General Court see cause to overrule in this case, we must submit."<sup>2</sup> But when it was rumored in 1783 that the Congress of the Confederation was overstepping its privileges, the town passed, among others, the following article. Addressing the State delegates, it said, "And first (Gentlemen) we desire and expressly instruct you to oppose all Encroachments of the American Congress upon the Sovereignty and Jurisdiction of the separate States, and every Assumption of Power not expressly vested in them by the Articles of Confederation."<sup>3</sup>

Far more worthy of admiration, and nobler in its accomplishment, was the relation which actually did exist between the town and the court in the colony of Connecticut. Its boasted democracy becomes almost greater in the practice than in the conception. This we realize when we see a body endowed with supreme power, unrestrained by any authority on earth, exercising that power with such moderation and remarkable political sagacity that the town appears as almost an independent unit. If an institution is the lengthened shadow of one man, then here we see Thomas Hooker with the king in

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<sup>1</sup> "The royal charter was a precious gift and came to be the object of almost superstitious regard. But it did not in any way affect the relations previously established between the people and their chosen rulers. The frame of government continued to rest on the same broad foundation on which the Constitution of 1639 had placed it, and 'the supreme power of the Commonwealth' was made to consist, as before, in the general court." Trumbull's Hist. Notes on the Constitution of Connecticut, pp. 10-11.

<sup>2</sup> Hart. Rec. I, p. 173.

<sup>3</sup> Hart. Rec. II, p. 301. For the nature of this encroachment see Curtis. Hist. of the Constitution, I, p. 190; Trumbull's Hist. Notes, p. 18.



his pocket, and his exceeding fervor of spirit well under control.

If the General Court of Massachusetts interfered in half the affairs of its towns, as says Dr. Ellis, it is safe to say that the General Court of Connecticut interfered practically in a proportion very much less, the exact fraction of which it would be difficult to formulate. Once established, the towns were left to run themselves. It was not often that the court directly interfered; it interposed its authority in case of disputes, instructed the towns in their duty when they seemed to be wandering from it, and offered its advice gratuitously if it seemed necessary. The towns were often unable to manage their own affairs, and then the peculiarly paternal position of the court most prominently appears. The town petitions were always carefully considered. In this way they came to the court for advice and counsel, to it they presented their difficulties; Windsor with her boundaries, Wethersfield with her minister, Simsbury in a pathetic appeal regarding her fences. The court in all such cases, full of almost a tender interest in its towns, appointed a committee to help them out of trouble. In matters of grievance it was the court of last resort, and its decision was final. Only when the towns seemed to be misusing their privileges was its manner firm, and against evildoers its tone was severe. Yet its laws were always temperate, and never arbitrary in their nature. For this reason town and colony grew without display, but with a political strength unequaled; and its people, made strong by adversity, and unhampered by a false political friction, have developed a state which has proved in the crises of history a bulwark to the nation.

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*Addendum.*—For the sake of clearness regarding a statement made in note 2, page 15, it should be explained that in 1636 Mr. Winthrop was Governor at Saybrook, acting under the Patentees. He was not Governor under the Constitution until 1657.

X-XI-XII

FEDERAL GOVERNMENT

IN

CANADA



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE.

HERBERT B. ADAMS, Editor.

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History is past Politics and Politics present History—*Freeman*.

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SEVENTH SERIES

X-XI-XII

FEDERAL GOVERNMENT

IN

CANADA

BY JOHN G. BOURINOT, HON. LL. D., D. C. L.

*Clerk of the House of Commons of Canada; Honorary Secretary of the Royal Society of Canada; Author of Parliamentary Practice and Procedure in Canada, Manual of the Constitutional History of Canada, Local Government in Canada (in Johns Hopkins University Studies, 5th Series, v-vi.)*

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CORRIGENDA.

Page 32; line 21, <i>for</i> third	<i>read</i> fourth.
" 130, " 17, " two or three	" five.
" 147, " 22, " \$1500	" \$10,000.
" 148, " 24, " legislative department	" judicial department.
" 151, " 20, " another by-law	" the question again.

# FEDERAL GOVERNMENT IN CANADA.

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## LECTURE I.

### HISTORICAL OUTLINE OF POLITICAL DEVELOPMENT.

In the course of this and the following lectures,<sup>1</sup> I propose to direct your attention to the Federal constitution of the Dominion of Canada. My review of the system of government which we now possess must necessarily be limited in its scope. I can but give you an outline of its leading features and a very imperfect insight into its practical operation. I do not pretend to do more than lay before you a mere sketch—perhaps not more than a tracing of the architect's work—and point out the strength and harmony of the proportions of the national structure which Canadian statesmen are striving to perfect on the northern half of the continent. At the same time I shall endeavor to indicate what seem, in the opinions of competent authorities, to be such defects and weaknesses as must always, sooner or later, show themselves in the work of human hands.

It is necessary that I should at the outset briefly trace the various steps in the political development of British North America, so that you may the more clearly understand the

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<sup>1</sup> These four lectures were read during the month of May, 1889, before Trinity University, Toronto, Canada, and are now printed for the first time with some notes and additions to the text.



origin and nature of our present system of government. Nor can I well leave out of the consideration some references to the political institutions that existed in Canada previous to 1759-60. Such a review will not give any evidence of political progress, but it would be very incomplete if it did not lay before you the characteristics of a system of government which is not simply interesting from an antiquarian or historical point of view, but also on account of the comparisons it leads us to make between the absolutism it represented and the political freedom which has been the issue of the fall of Quebec in 1759, and of the supremacy of England in Canada.

But there is another important consideration which renders it absolutely necessary that I should give more than a passing allusion to the French period of Canadian history. Though more than a century and a quarter has passed since those days of the French régime, many of the institutions which were inherited from old France have become permanently established in the country, and we see constantly in the various political systems formed in Canada from time to time the impress of those institutions and the influence of the people of French Canada.

As the most convenient method of dealing with this part of my subject, I shall leave the consideration of the political development of Nova Scotia and the other small provinces until the last lecture, when I come to review the present constitution of their governments and legislatures. I shall confine myself for the present to the political history of the large country generally known as Canada until 1867, and now divided into the provinces of Ontario and Quebec. This history may be properly divided into several Periods, varying in the number of years from the time Champlain laid the foundation of the French colony on the banks of the St. Lawrence, down to the establishment of the system of federation.

First of all we have the period when France claimed dominion over the extensive ill-defined territories watered by the St. Lawrence and the great Lakes and including the valleys

of the Ohio and the Mississippi Rivers. During this period which lasted from 1608 to 1759-60,—for it is not necessary to refer to the abortive expedition of the Marquis de la Roche or to the voyages of Jacques Cartier which did not lead to immediate colonization,—Canada was under the control for a number of years of proprietary governments chartered by the king to carry on trade in the country whose furs were already highly valued in the markets of Europe. In those days of chartered corporations the governor was radically supreme and exercised executive, legislative and judicial powers with the assistance of a council which he consulted according to his pleasure. By 1663, however, Louis XIV. decided under the advice of the eminent statesman Colbert to take the government of Canada into his own hands, but the measures he proposed were for a while kept in abeyance on account of a charter for commercial purposes being granted to a new company under the influence of courtiers anxious to use the colony for their own selfish purposes. But Colbert was ambitious to extend the commerce of France and establish colonies wherever she had a foothold, and in this respect he was wise above statesmen of his day. Accordingly we find that on the failure of the new company to realize its expectations no fresh effort was made in the same direction, but the plans of 1663 were carried out in 1674 and the king and his minister took all the measures necessary to establish beyond legal doubt a regular system of government in accordance with the autocratic spirit which characterized regal power in those days. It has been well observed by the historian Parkman that the governor of Canada as well as the intendant, the next most important if not indeed in many ways the most important functionary of state, were to all intents and purposes in point of authority, the same officials who presided over the affairs of a province of France. In Canada as in France governors-general had only such powers as were expressly given them by the king who, jealous of all authority in others, kept them rigidly in check. In those days the king was supreme; “I am the state”

said Louis Quatorze in the arrogance of his power. The feudal system of France had been long since deprived of its dangers to the monarch and the nobles of the once proud feudal families, who in old times had even defied their feudal chief, were now kept within the courtly precincts to pay him homage and obey his commands. The three estates, the nobles, clergy and *tiers état*, or the "nation," still existed in name, but while the first was stripped of real power and the second exercised its usual influence on the conscience of the devout the people groaned under the exactions of the king and his courtiers. The states-general never assembled to give voice to the complaints of the nation and provide redress. We find there were Parliaments that assembled at stated periods at Paris, Rouen and other important places but in no respect did they resemble that great council of the English people which from the earlier days of English history has been so often a check on kingly assumptions. The Parliaments of France were purely of a judicial character, and though at times they served as a curb on the absolutism of the king, as a rule they were under his control, and forced under all circumstances to register his decrees, however objectionable they might be. In view of such facts it is easy to understand that there could be no such things as free government or representative institutions in Canada, like those enjoyed from the very commencement of their history by the old English colonies which were founded almost contemporaneously with the settlement of Acadia and Canada by De Poutrincourt and Champlain.

The governor had command of the militia and troops, and was nominally superior in authority to the intendant, but in the course of time the latter became virtually the most influential officer in the colony, and even presided at the council board. This official, who had the right to report directly to the king on colonial affairs, had large civil, commercial and maritime jurisdiction, and could issue ordinances on his own responsibility which had full legal effect in the country. Associated with the governor, and intendant was a council, com-

prising in the first instance five, and, eventually, twelve persons chosen from the leading people of the country. The change of name from the "Supreme Council" to the "Superior Council" is of itself some evidence of the determination of the king to restrain the pretensions of all official bodies throughout the kingdom and its dependencies. This body exercised legislative and judicial powers, and was a court of appeal from the judicial functionaries at Quebec, Montreal, and Three Rivers, the principal towns of the three districts into which the country was divided for the administration of justice in accordance with the *Coutume de Paris*. The Bishop was a member of the council, and the history of the colony is full of the quarrels that arose between him and the governor on points of official etiquette, or with respect to more important matters affecting the government of the country. The Roman Catholic Church, from the very first settlement of Canada, was fostered by express provisions in the charters of the incorporated commercial companies. The causes that assisted in the colonization of the French colony were trade and religion, and the priestly missionary was as frequent a visitor in the camp of the Indian tribes as the *Coureur de bois*, who wandered over the Western wilderness in the days of the French régime. When the king assumed the government, the bishop and his clergy continued to increase their power and wealth, and by the time of the conquest the largest landed proprietors, and in many respects the wealthiest, were the church and its communities. The seignioriness soon gave way to the parish of the church, as a district for local as well as for ecclesiastical purposes. Tithes were imposed and regulated by the government, and as the country became more populous the church grew in strength and riches. It held always under its control the education of the people, and was then, as now, the dominant power in the country.

The king and the council of state in France kept a strict supervision over the government of the colony. An appeal lay to the king in all civil and criminal matters, but the dis-



tance between Paris and Quebec, in those days of slow communication, tended to keep up many abuses under which the people suffered, and it is easy to explain how it was that an unscrupulous intendant like Bigot was able to cheat the Canadians for so many years with impunity and amass large wealth by the most disgraceful speculation and jobbery.

We look in vain for evidence of popular freedom or material prosperity during these times. The government was autocratic and illiberal, and practically for many years in the hands of the intendant. Public meetings were steadily repressed and even the few that were held in those early days on occasions of public emergency could be called only at the instance of the authorities. No system of municipal government was established, and the efforts to elect aldermen for civic purposes in Quebec were almost immediately rendered ineffectual by the open or insidious hostility of the governing powers. Some semblance of popular representation was given for a while by the election of "syndics," a class of officials peculiar to French local administration, though we can trace their origin to the Greeks. The French Canadian colonists had in all probability brought with them among their customary rights that of choosing an agent for the special purpose of defending the interests of a community whenever necessary before the authorities, but in accordance with the principles that lay at the basis of the Canadian government, the people soon found themselves incapable of exercising what might have been a useful municipal office, and might have led to the extension of popular privileges. It is not strange, then, that the *habitants* of the seigniories, as well as the residents in the towns, lived for the most part a sluggish existence without any knowledge of, or interest in the affairs of the colony, which were managed for them without their consent or control, even in cases of the most insignificant matters. Even trade was in fetters. Canadians could only deal with France, in conformity with the restrictive policy of those times when colonies were considered simply feeders for the commerce of the parent state.

It may be urged with truth that the French Canadian had no knowledge of those free institutions which Englishmen brought to this continent as their natural birthright. The people of France were crushed beneath the heels of the king and nobles, and the Norman or Breton was hardly a freeman like an Englishman of Devon or Kent. But transplanted to the free atmosphere of this continent, and given some opportunities for asserting his manhood, the bold courageous native of Brittany or Normandy might have sooner or later awaked from his political lethargy, and the conquest might have found him possessor of some political rights and in many respects an energetic member of the community. This was, however, impossible in a country where the directions of the king and his pliant ministers were always to the effect that liberty of speech should be rigidly repressed. Even the Marquis of Frontenac, when governor, was told in very emphatic terms that he made a grievous mistake when he presumed to advise the assembling of the Canadians on the plan of the *états généraux* of France; a piece of presumption, indeed, when the representative assemblies were never called together even in the parent state.

We must now come to the Second Period in our political history, which dates from that hour of humiliation for France and her Canadian offspring, the capitulation of Quebec and of Montreal in 1759-1760. This was the commencement of that new era during which the French Canadians were gradually to win for themselves the fullest political freedom under the auspices of England. The second period may be considered for the purposes of historical convenience, to be the transition stage from the conquest until the granting of representative institutions in 1791. I call it a transition stage because it illustrates the development from the state of complete political ignorance that existed at the time of the conquest to the state of larger political freedom that the constitutional act of 1791 gave to the people of Canada. During this transition period it is interesting to notice the signs that the

French Canadian leaders gave from time to time of their comprehension of self government, even within a quarter of a century from the day they emerged from the political darkness of their own country under the French régime. Several political facts require brief mention in this connection. From 1760 to 1763 when Canada was finally ceded to Great Britain by the Treaty of Paris there was a military government as a necessary consequence of the unsettled condition of things, but it does not demand any special consideration in this review. Then King George III issued his famous proclamation of 1763,<sup>1</sup> and by virtue of the royal prerogative established a system of government for Canada. The people were to have the right to elect representatives to an assembly, but the time was not yet ripe for so large a measure of political liberty, if indeed it had been possible for them to do so under the instructions to the governor-general, which required all persons holding office or elected to an assembly to take oaths against transubstantiation and the supremacy of the Pope. This proclamation which was very clumsily framed in the opinion of lawyers created a great deal of dissatisfaction, not only for the reason just given but on account of its loose reference to the system of laws that should prevail in the conquered country. As a matter of fact the ordinances issued by the governor and executive council that now governed Canada, practically went to establish both the common and the criminal law of England to the decided inconvenience and dissatisfaction of the French Canadians accustomed to the civil law of France. But events were shaping themselves in favor of the French Canadians or "new subjects" as they were called in those days. The difficulty that had arisen between England and the old thirteen colonies led her statesmen to pay more attention to the state of Canada and to study the best methods of strengthening their government in the French colony, where

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<sup>1</sup> Issued 7th October, 1763. See text at the end of third volume of Cartwright's Cases on the British North America Act.

the English element was still relatively insignificant though holding practically the reins of power by means of the executive council and the public offices. In 1774 the parliament of Great Britain was for the first time called upon to intervene in the affairs of Canada and passed the act giving the first constitution to Canada, generally known in our history as the Quebec act.<sup>1</sup> During the same session were passed a series of acts with the object of bringing the colonists of New England into a more humble and loyal state of mind; for the cargoes of tea, inopportunately despatched to different colonial ports, had been already destroyed, and the discontent that prevailed generally in the colonies, especially in Massachusetts, had reached a crisis. The Quebec act was in the direction of conciliating the French Canadians, who naturally received it with much satisfaction. The English, on the other hand, regarded it with great disfavor, and the same may be said of the people of the old thirteen colonies, who subsequently, through their Congress, stated their objections in an appeal to the people of Great Britain, and declared it to be "unjust, unconstitutional, and most dangerous and destructive of American rights." The act established a legislative council nominated by the crown, and the project of an assembly was indefinitely postponed. The French Canadians were not yet prepared for representative institutions of whose working they had no practical knowledge, and were quite content for the time being with a system which brought some of their leading men into the new legislative body. All their experience and traditions were in favor of a governing body nominated by the king, and it required time to show them the advantage of the English system of popular assemblies. But what made the act so popular in Lower Canada was the fact that it removed the disabilities under which the French Canadians, as Roman Catholics, were heretofore placed, guaranteed them full freedom of worship, and placed the church, with the

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<sup>1</sup> Imp. Act, 14th Geo. III, cap. 83.



exception of the religious orders, the Jesuits and Sulpitians,<sup>1</sup> in complete possession of their valuable property. The old French law was restored in all matters of controversy relating to property and civil rights. The criminal law of England, which was, in the opinion of the French Canadians, after an experience of some years, preferable to their own system on account of its greater mildness and humanity, was to prevail throughout the country. The hostile sentiment that existed in Canada, and the old thirteen colonies arose in a great measure from the fact that the civil law of France was applied to the English residents not only in the French section, but to the large area of country extending to the Mississippi on the west, and the Ohio on the south, so as to include the territory now embraced by the five States northwest of the Ohio.

While this act continued in force various causes were at work in the direction of the extension of popular government. The most important historical fact of the period was the coming into British North America of some forty thousand persons, known as United Empire Loyalists, who decided not to remain in the old thirteen colonies when these foreswore their allegiance to the king of England. Few facts of modern times have had a greater influence on the destinies of a country than this immigration of sturdy, resolute and intelligent men, united by high principles and the most unselfish motives. They laid the foundations of the provinces now known as New Brunswick and Ontario, and settled a considerable portion of Nova Scotia. From the day of their settlement on the banks of the St. John, Niagara and St. Lawrence rivers, and in the vicinity of Lakes Ontario and Erie, they have exercised by themselves and their descendants a powerful influence on the institutions

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<sup>1</sup> The Sulpitians, who are a very wealthy corporate body, were left in possession of their property, but it was not until 1839 that they received legal recognition. The Crown took formal possession of the property of the Jesuits in 1800 on the death of the last representative of the order in Canada. See Lecture II, and Lareau, *Histoire du Droit Canadien*, II, pp. 195-200.

of Canada, not unlike that exercised by the descendants of the New England pioneers throughout the American Union ; and it is to them we owe much of that spirit and devotion to England which has always distinguished the Canadian people and aided to keep them, even in critical periods of their history, within the empire.

In view of the rapidly increasing English population of Canada and of the difficulties that were constantly arising between the two races,—difficulties increased by the fact that the two systems of law were constantly clashing and the whole system of justice was consequently very unsatisfactorily administered,—the British government considered it the wisest policy to interfere again and form two separate provinces, in which the two races could work out their own future, as far as practicable, apart from each other. This was a very important change in its far-reaching consequences. It was not merely another remarkable step in the political development of Canada, but it was to have the effect not only of educating the French Canadians more thoroughly in the advantages of self-government but of continuing the work which the Quebec Act practically commenced, and strengthening them as a distinct nationality desirous of perpetuating their religion and institutions.

The passage of the Constitutional Act of 1791<sup>1</sup> is the beginning of the Third Period in the political history of Canada, which lasted for half a century until it was found necessary to make another important change in the constitution of the provinces. This Act extended the political liberties of the people in the two provinces of Upper Canada and Lower Canada—now Ontario and Quebec—organized under the Act, since it gave them a complete legislature, composed of a governor, a legislative council nominated by the crown, and an assembly elected by the people on a limited franchise, principally the old forty shilling freehold system so long in vogue

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<sup>1</sup> Imp. Act, 31 Geo. II, Cap. 31.

in English speaking colonies. The object was, as stated at the time, to separate the two races as much as possible and to give both a constitution resembling that of England as far as the circumstances of the country would permit.

The history of the two provinces, especially of French Canada, under the operation of the Constitutional Act of 1791, is full of instruction for the statesman and political student. It illustrates the fact which all history teaches, that the political development of a people must be always forward the moment their liberties are extended, and that the refusal of franchises and privileges necessary to the harmonious operation of a government is sure sooner or later to breed public discontent. I do not purpose to dwell on well-known historical facts, but there are a few considerations bearing on this review of political development which I shall briefly mention. In the first place the constitution of 1791, though giving many concessions and privileges to the provinces, had an inherent weakness, since it professed to be an imitation of the British system, but failed in that very essential principle which the experience of England has proved is absolutely necessary to harmonize the several branches of government; that is the responsibility of the executive to parliament, or more strictly speaking to the assembly elected by the people. The English representatives in the province of Upper Canada soon recognized the value of this all important principle of parliamentary government according as they had experience of the practical operation of the system actually in vogue; but it is an admitted fact that the French Canadian leaders in the assembly never appreciated, if indeed they ever understood, the constitutional system of England in its full significance. Their grievances, as fully enumerated in the famous resolutions of 1834, were numerous, but their principal remedy was always an elective legislative council, for reasons quite intelligible to the student of those times. The conflict that existed during the last thirty years of this period was really a conflict between the two races in Lower Canada, where the French and elective

element predominated in the Assembly, and the English and official or ruling element in the legislative council. The executive government and legislative council, both nominated by the crown, were virtually the same body in those days. The ruling spirits in the one were the ruling spirits in the other. The English speaking people were those rulers, who obstinately contested all the questions raised from time to time by the popular or French party in the assembly. In this contest of race, religion and politics the passions of men became bitterly inflamed and an impartial historian must deprecate the mistakes and faults that were committed on both sides. But looking at the record from a purely constitutional point, it must be admitted that there was great force in the arguments presented by the assembly against many anomalies and abuses that existed under the system of government. They were right in contending for having the initiation and control of the public expenditures in accordance with the principles of parliamentary government. The granting of supply is essentially the privilege of a people's house, though no measure can become law without the consent of the upper house, which may reject, but cannot amend a revenue or money bill. Another grievance was the sitting of judges in both houses. While the British government soon yielded to the remonstrances of the assembly, and instructed the governor to consent to the passage of an act to prevent the continuance of this public wrong—for it cannot be considered otherwise—of judges having a seat in the assembly, they were permitted to remain both in the executive and legislative councils for nearly the duration of the constitutional act. It was not until the assembly endeavored to impeach the judges year after year, and deluged the imperial parliament with addresses on the subject, that this grievous defect disappeared from the political system.

In Upper Canada the political difficulties never assumed so formidable an aspect as in the French Canadian section. No difference of race could arise in the Western province, and



the question of supplies gradually arranged itself more satisfactorily than in Lower Canada, but in course of time there arose a contest between officialism and liberalism. An official class held within its control practically the government of the province. This class became known in the parlance of those days as the "family compact," not quite an accurate designation, since the ruling class had hardly any family connection, but there was just enough ground for the term to tickle the taste of the people for an epigrammatic phrase. The clergy reserves question grew out of the grant to the Protestant Church in Canada of large tracts of land by the constitutional act, and was long a burning dominant question in the contest of parties. The reformers, as the popular party called themselves, found in this question abundant material for exciting the jealousies of all the Protestant sects who wished to see the Church of England and Church of Scotland deprived of the advantages which they alone derived from this valuable source of revenue.

The history of this period, however full of political mistakes, is interesting since it shows how the people, including the French Canadians, were learning the principles on which parliamentary government must rest. It was history repeating itself, the contest of a popular assembly against prerogative, represented in this case by the governor and executive which owed no responsibility to the people's house. Those times of political conflict have happily passed and the dominant body now is the people's house, where the council only holds power by the will of the majority. If there is cause for complaint, or danger in the present system, it is in the too great power assumed by the executive or ministry and the tendency to yield too much to its assumptions on the part of the political majority.

I have endeavored, as briefly as possible, to show the principal causes of irritation that existed in Canada during the third period of our history. All these causes were intensified by the demagoguism that is sure to prevail more or less in

times of popular agitation, but the great peril all the while in Lower Canada arose from the hostility of the two races in the political arena as well as in all their social and public relations. The British government labored to meet the wishes of the discontented people in a fair and conciliatory spirit but they were too often ill advised or in a quandary from the conflict of opinion. No doubt the governors on whom they naturally depended for advice were at times too much influenced by their advisers, who were always fighting with the people's representatives and at last in the very nature of things made advocates of the unpopular party. Too generally they were military men, choleric, impatient of control, and better acquainted with the rules of the camp than the rules of constitutional government and sadly wanting in the tact and wisdom that should guide a ruler of a colony. Exception must be made of Lord Dorchester who, like Wellington and even Marlborough, was a statesman who would have been found invaluable had fate given him to Canada at a later period of her history when the political discontent was at last fanned into an ill-advised rebellion in the two provinces, a rebellion which was promptly suppressed by the prompt measures immediately taken by the authorities.

In Lower Canada the constitution was suspended and the government of the country from 1838-1841 was administered by the governor and a special council. The most important fact of this time was the mission of Lord Durham, a distinguished English statesman, to inquire into the state of the country as governor-general and high commissioner. Few state papers in English history have had greater influence on the practical development of the colonies than the elaborate report which was the result of his review of the situation. It was a remarkably fair summary of the causes of discontent and suggested remedies which recommend themselves to us in these days as replete with political wisdom. The final issue of the inquiries made into the condition of the country was the intervention of parliament once more in the affairs of

Canada and the passage of another Act providing for a very important constitutional change.

The proclamation of the Act of 1841<sup>1</sup> was the inauguration of the Fourth Period of our political development which lasted until 1867. The discontent that existed in Canada for so many years had the effect, not of diminishing but of enlarging the political privileges of the Canadian people. The Imperial government proved by this measure that they were desirous of meeting the wishes of the people for a larger grant of self-government. The French Canadians, however looked upon the Act with much disfavor and suspicion. The report of Lord Durham and the union itself indicated that there was a feeling in England that the separation of the two races in 1791 had been a political mistake, since it prevented anything like a national amalgamation; and it was now proposed to make an effort in the opposite direction and diminish the importance of the French Canadian section with its distinct language and institutions. The fact that the French language was no longer placed on the same footing as English, in official documents and parliamentary proceedings, together with the fact that Upper Canada had the same representation as Lower Canada in the assembly, despite the larger population of the latter section, was considered an insult and an injustice to the French Canadians, against which they did not fail to remonstrate for years.

But in my studies and personal experience of the times in which I live, I have been often struck by the fact that the logic of events is much more forcible than the logic of statesmen. So far from the act of 1841, which united the Canadas, acting unfavorably to the French Canadian people it gave them eventually a predominance in the councils of the country and prepared the way for the larger constitution of 1867 which has handed over to them the control of their own province, and afforded additional guarantees for the preservation of their lan-

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<sup>1</sup> Imp. Act 3 and 4 Vic., Cap. 35.

guage and institutions. French soon became again the official language by an amendment of the union act, and the clause providing for equality of representation proved a security when the upper province increased more largely in population than the French Canadian section. The act was framed on the principle of giving full expansion to the capacity of the Canadians for local government, and was accompanied by instructions to the governor-general, Mr. Poulett Thomson, afterwards Lord Sydenham, which laid the foundation of responsible government. It took several years to give full effect to this leading principle of parliamentary government, chiefly on account of the obstinacy of Lord Metcalfe during his term of office; but the legislature and the executive asserted themselves determinately, and not long after the arrival in 1847 of Lord Elgin, one of the ablest governors-general Canada has ever had, the people enjoyed in its completeness that system of the responsibility of the cabinet to parliament without which our constitution would be unworkable. More than that, all the privileges for which the people had been contending during a quarter of a century and more, were conceded in accordance with the liberal policy now laid down in England for the administration of colonial affairs. The particular measure which the French Canadians had pressed for so many years on the British government, an elective legislative council, was conceded. When a few years had passed the Canadian Legislature was given full control of taxation, supply and expenditure in accordance with English constitutional principles. The clergy reserves difficulty was settled and the lands sold for public or municipal purposes, the interests of existing rectors and incumbents being guarded. The great land question of Canada, the seigniorial tenure of Lower Canada, was disposed of by buying off the claims of the seigniors. With the abolition of a system, which had its advantages in the early French times, since it forced both seignior and habitant to settle and clear their lands within a certain period, a relic of feudal days, foreign to the free spirit of American civilization,



disappeared from our civil system and the people of lower Canada were freed from exactions which had become not so much onerous as vexatious, and were placed on the free footing of settlers in all the English communities of America. Municipal institutions of a liberal nature especially in the province of Ontario, were established, and the people of the provinces enabled to have that control of their local affairs in the counties, townships, cities and parishes which is necessary to carry out public works indispensable to the comfort, health and convenience of the community, and to supplement the efforts made by the legislature, from time to time, to provide for the general education of the country ; efforts especially successful in the province of Upper Canada where the universities, colleges and public schools are so many admirable illustrations of energy and public spirit. The civil service, which necessarily plays so important a part in the administration of government, was placed on a permanent basis and has ever since afforded a creditable contrast with the loose system so long prevalent in the United States, where the doctrine, "To the victors belong the spoils,"<sup>1</sup>—which was established in the time of President Jackson, though the phrase originated with a New York politician, W. L. Marcy—was found necessary and very convenient to satisfy the great body of office-seekers who naturally grew up in a country where elections are so frequent and professional politicians so numerous. In addition to those progressive measures, we may mention the acts securing the independence of parliament, the codification of the French civil law, the consolidation of the public statutes, the improvement of the election laws so as to ensure greater purity at elections, as among the legislation of a period replete with usefulness and admirably illustrating the practical character of Canadian public men.

The union of 1841 did its work and the political conditions of Canada again demanded another radical change commen-

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<sup>1</sup> Sumner's *Life of Andrew Jackson*, in *American Statesmen series*, p. 162.

surate with the material and political development of the country, and capable of removing the difficulties that had arisen in the operation of the Act of 1841. The claims of Upper Canada to larger representation, equal to its increased population since 1840, owing to the great immigration which naturally sought a rich and fertile province, were steadily resisted by the French Canadians as an unwarrantable interference with the security guaranteed to them under the Act. This resistance gave rise to great irritation in Upper Canada where a powerful party made representation by population their platform, and government at last became practically impossible on account of the close political divisions for years in the assembly. The time had come for the accomplishment of a great change foreshadowed by Lord Durham, Chief Justice Sewell, Mr. Howe, Sir Alexander Galt, and other public men of Canada: the union of the provinces of British North America. The leaders of the different governments in Canada and the maritime provinces of Nova Scotia, New Brunswick, and Prince Edward Island, to whose political history I shall refer in a later lecture, after negotiations into which I need not enter here, combined with the leaders of the opposition with the object of carrying out this great measure. A convention of thirty-three representative men was held in the autumn of 1864 in the historic city of Quebec, and after a deliberation of several weeks the result was the unanimous adoption of a set of seventy-two resolutions embodying the terms and conditions on which the provinces through their delegates agreed to a federal union in many respects similar in its general features to that of the United States federation, and in accordance with the principles of the English constitution. These resolutions had to be laid before the various legislatures and adopted in the shape of addresses to the queen whose sanction was necessary to embody the wishes of the provinces in an imperial statute.

It is an important fact that the consent of the legislature was deemed sufficient by the governments of all the provinces

except one, though the question had never been an issue at the polls before the election of the legislative bodies which assumed the complete responsibility of this radical change in the constitutional position and relations of the countries affected. In New Brunswick the legislature was dissolved twice on the issue, and the opposition in the Nova Scotia assembly retarded the accomplishment of the measure, but finally both these provinces came into accord with the Canadian parliament, where only a relatively small minority urged objections to the proposed union. In the early part of 1867 the imperial parliament, without a division, passed the statute known as the "British North America Act, 1867," which united in the first instance the province of Canada, now divided into Ontario and Quebec, with Nova Scotia and New Brunswick and made provisions for the coming in of the other provinces of Prince Edward Island, Newfoundland, British Columbia, and the admission of Rupert's Land and the great North-west.

Between 1867 and 1873 the provinces just named, with the exception of Newfoundland, which has persistently remained out of the federation, became parts of the Dominion and the vast North-west Territory was at last acquired on terms eminently satisfactory to Canada and a new province of great promise formed out of that immense region, with a complete system of parliamentary government.

I have endeavored in the preceding pages to review within as brief a space as possible the salient features in the political development of Canada, and it is my intention in the lectures that follow to direct attention to the framework and operation of the constitutional system. I shall not treat the questions that arise from a mere technical or legal view, but from the standpoint of one who has many opportunities of observing its practical working. I shall refer to the various important changes that have occurred in the legislation of the country affecting the various branches of government, and try to point out what appear, according to the expe-

rience the country has gained within a quarter of a century, to be defects in the system requiring amendment sooner or later in order to give it more elasticity, efficiency and permanency.

So far as I have gone my readers will see even from this very imperfect summary of the political history of Canada for two hundred and sixty years since the foundation of Quebec, and one hundred and four years since the treaty of Paris, that there has been a steady development ever since England, the birth-place of free institutions, took the place of France, so long the home of an absolute, irresponsible autocracy. It took a century to bring about the changes that placed Canada in the semi-independent position she now occupies, but as we review the past we can see there was ever an undercurrent steadily moving in the direction of political freedom. Politicians might wrangle and commit the most grievous mistakes; governments in England and Canada might misunderstand public sentiment in the colony, and endeavor to stem the stream of political progress, but the movement was ever onward and the destiny that watches over peoples as well as over individuals was shaping our political ends, and, happily, for our good.

The results of these many years of political agitation through which Canada has passed have been eminently favorable to her interests as a political community. No country in the world enjoys a larger measure of political liberty or greater opportunities for happiness and prosperity under the liberal system of government which has been won by the sagacity and patience of her people.

Somewhere I have seen it said that the tree of liberty, like the oak or the maple, cannot spring suddenly into existence and attain full maturity in a day, but grows slowly and must bend at times beneath the storms of faction. But once it has taken deep root in a congenial soil, passion beats in vain against its trunk and the people find safety and shelter beneath its branches. The tree of liberty was long ago brought into



this country from the parent state, and has now developed into goodly proportions amid the genial influences that have so long surrounded it.

Of Canada we may now truly say that it is above all others "a land of settled government" resting on the vital principles of political freedom and religious toleration, and all those maxims which, experience has shown the world, are best calculated to make communities happy and prosperous.

## LECTURE II.

### GENERAL FEATURES OF THE FEDERAL SYSTEM.

The Dominion<sup>1</sup> of Canada now consists of seven provinces regularly organized and of an immense area of undeveloped and sparsely settled territory extending from Ontario to the base of the Rocky Mountains, and temporarily divided into four large districts, for the purposes of government. The area of the whole Dominion is only thirty thousand English square miles less than that of the United States,<sup>2</sup> including the vast

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<sup>1</sup> "The history of the circumstances under which the name of the 'Dominion' came to be given to the united provinces shows the desire of the Canadians to give to the confederation, at the very outset, a monarchical likeness in contradistinction to the republican character of the American federal union. We have it on the best authority that in 1866-67 the question arose during a conference between the Canadian delegates and the Imperial authorities what name should be given to the confederation of the provinces, and it was first proposed that it should be called 'The Kingdom of Canada;' but it is said that the Earl of Carnarvon, then secretary of state for the colonies, thought such a designation inadvisable, chiefly on the ground that it would be probably objectionable to the government of the United States, which had so recently expressed its disapprobation of the attempt of the Emperor Napoleon to establish an imperial European dynasty in Mexico. . . . The Canadian delegates made due allowance for the delicacy of the sentiments of the minister and agreed, as a compromise, to the less ambitious title, Dominion of Canada,—a designation recalling that 'Old Dominion,' named by Raleigh in honor of the virgin Queen." See article by author in the *Scottish Review* for April, 1885.

<sup>2</sup> The United States has an area of 3,501,404 square miles, inclusive of Alaska (577,390); Canada, 3,470,392, or about the same area as Brazil; Europe 3,800,000 square miles.

territory of Alaska. Its total population is about five millions of souls, of whom probably two millions and a quarter live in Ontario, nearly a million and a half in Quebec, and the remainder in the smaller provinces and in the territories. Out of the North-west has already been carved the province of Manitoba which has made remarkable progress, while a stream of population is now steadily flowing over the rich prairies and grazing lands of the territories. The Maritime Provinces are inhabited by an English people, with the exception of certain districts, especially in New Brunswick, where there is a small Acadian population still speaking the French language. Quebec has a French population of at least a million and a quarter of souls, professing the Roman Catholic religion and clinging with remarkable tenacity to their language and institutions, and commencing to swarm over certain portions of the Western Province. The population of Ontario is mainly English and Protestant; and the same may be said of the other provinces. In the territories and British Columbia there is a large Indian population, whose interests are carefully guarded by the government of Canada. The industrial pursuits of Nova Scotia and New Brunswick, both washed by the Atlantic ocean, are principally maritime, mining and commercial. Prince Edward Island is chiefly agricultural. The St. Lawrence is the natural artery of communication, by the aid of a magnificent system of canals, between the ocean and the provinces of Quebec and Ontario, and as far as the city of Port Arthur at the head of Lake Superior. Railways reach from Halifax to the growing city of Vancouver on the Pacific coast, and afford great facilities of commercial intercourse between the new territories and the markets of the old provinces and the rest of the world. The wealth of Ontario arises from her agricultural products, aided by a large system of manufactories. Quebec has varied interests, farming, manufacturing and commercial. The territories promise to be the principal granary of the continent, while British Columbia has large undeveloped wealth in her mountains and in the

seas that wash her coast. To unite and give a community of interest to all these territorial divisions of the Dominion—the Maritime Provinces, Quebec, Ontario, the North-west and British Columbia—and harmonize the ethnological and other differences that now exist within the limits of the confederation, is the very serious responsibility thrown upon the central and the local governments which derive their powers from the British North America Act of 1867. How far the system which this act provides is likely to promote these objects, I shall attempt to show in the course of this and succeeding lectures.

When the terms of the Union came to be arranged between the provinces in 1864, their conflicting interests had to be carefully considered and a system adopted which would always enable the Dominion to expand its limits and bring in new sections until it should embrace the northern half of the continent, which, as we have just shown, now constitutes the Dominion. It was soon found, after due deliberation, that the most feasible plan was a confederation resting on those principles which experience of the working of the federation of the United States showed was likely to give guarantees of elasticity and permanency. The maritime provinces had been in the enjoyment of an excellent system of laws and representative institutions for many years, and were not willing to yield their local autonomy in its entirety. The people of the province of Quebec, after experience of a union that lasted from 1841 to 1867, saw decidedly great advantages to themselves and their institutions in having a provincial government under their own control. The people of Ontario recognized equal advantages in having a measure of local government, apart from French Canadian influences and interference. The consequence was the adoption of the federal system, which now, after twenty-six years' experience, we can truly say appears on the whole well devised and equal to the local and national requirements of the people.

We owe our constitution to the action of the Parliament of Great Britain, before whom, as the supreme authority of the



Empire, the provinces of Canada had to come and express their desire to be federally united. In the addresses to the Queen embodying the resolutions of the Quebec conference of 1864 the legislatures of the provinces respectively set forth that in a federation of the British North American provinces, "the system of government best adapted under existing circumstances to protect the diversified interests of the several provinces, and secure harmony and permanency in the working of the Union would be a general government charged with matters of common interest to the whole country, and local governments for each of the Canadas, and for the provinces of Nova Scotia, New Brunswick and Prince Edward Island, charged with the control of local matters in their respective sections."

In the third paragraph the resolutions declare that "in framing a constitution for the general government, the conference, with a view to the perpetuation of our connection with the mother country, and the promotion of the best interests of the people of these provinces, desire to follow the model of the British constitution so far as our circumstances permit." In the fourth paragraph it is set forth: "The executive authority or government shall be vested in the sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British constitution, by a sovereign personally, or by the representative of the sovereign duly authorized."<sup>1</sup>

In these three paragraphs we see tersely expressed the leading principles on which our system of government rests: a federation with a central government exercising general powers over all the members of the union, and a number of local governments having the control and management of certain mat-

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<sup>1</sup> The preamble of the B. N. A. Act of 1867 sets forth that "the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom."

ters naturally and conveniently falling within their defined jurisdiction, while each government is administered in accordance with the British system of parliamentary institutions. These are the fundamental principles which were enacted into law by the British North America Act of 1867.

Before I proceed to refer to the general features of the federal system I may here appropriately observe that the practical operation of the government of Canada affords a forcible illustration of a government carried on not only in accordance with the legal provisions of a fundamental law, but also in conformity with what has been well described by eminent writers as conventions or understandings which do not come within the technical meaning of laws since they cannot be enforced by the courts. It was Professor Freeman<sup>1</sup> who first pointed out this interesting and important distinction, but Professor Dicey has elaborated it in a recent work, in which he very clearly shows that "constitutional law" as we understand it in England and in this country, consists of two elements: "The one element, which I have called the 'law of the constitution' is a body of undoubted law; the other element which I have called the 'conventions of the constitution,' consists of maxims or practices which, though they regulate the ordinary conduct of the Crown and of Ministers and of others under the constitution, are not in strictness law at all."<sup>2</sup> In Canada this distinction is particularly noteworthy. We have first of all the British North America Act<sup>3</sup> which lays down the legal rules for the division of powers between the respective federal and provincial authorities, and for the government of the federation generally. But it is a feature of this government that, apart from the written law, there are practices which can only be found in the usages and conventions that have originated in the general operation of the British constitution—that mass

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<sup>1</sup> Freeman's *Growth of the English Constitution*, pp. 114, 115.

<sup>2</sup> Dicey's *Law of the Constitution*, p. 25.

<sup>3</sup> Imp. Act, 30-31 Vict. c. 3.

of charters, statutes, practices, and conventions, which must be sought for in a great number of authorities. For example, if we wish in Canada to see whether a special power is given to the dominion or to the provincial governments we must look to the written constitution—to the ninety-first and ninety-second sections, to which I shall refer later on—but if we would understand the nature of the constitutional relations between the governor-general and his advisers we must study the conventions and usages of parliamentary or responsible government as it is understood in England and Canada. The courts accordingly will decide whether the parliament or the legislatures have a power conferred upon them by the constitutional law whenever a case is brought before them by due legal process ; but should they be asked to adjudicate on the legality of a refusal by a government to retire from office on an adverse vote of the people's house, they could at once say that it was a matter which was not within their legal functions, but a political question to be settled in conformity with political conventions with which they had nothing whatever to do. Or if Parliament should continue to sit beyond the five years' term, to which it is restricted by law, and then pass certain acts, the constitutionality of such legislation could be questioned, and the courts could declare it null and void. Or again, the constitutional act requires that every vote of money must be first recommended formally by the governor-general, and if it should appear that parliament had passed an act without that legal formality, the courts could be called upon to consider the legal effect of this important omission. On the other hand, it is a well-understood maxim that no private member can initiate a measure imposing a tax on the people, but it should come from a minister of the Crown—a rule rigidly observed in parliament—but this is not a matter of legal enactment which the courts can take cognizance of though it is a convention of the unwritten constitution which is based on well-understood principles of ministerial responsibility. I might pursue this subject at greater length, but I think I have said

enough to show you how interesting is the study of our constitution and what a wide field of reflection it opens up to the student. We have not only a written constitution to be interpreted whenever necessary by the courts, but a vast store-house of English precedents and authoritative maxims to guide us—in other words, an unwritten law which has as much force practically in the operation of our political system as any legal enactment to be found on the statute book.

The British North America Act gave legal effect to the wishes of the people of Canada, as expressed in the addresses of their legislatures, and is consequently the fundamental law, or constitution of the Dominion, only to be amended in its material and vital provisions by the same authority that enacted it.<sup>1</sup> Power is only given in the act itself to the Canadian legislature for the amendment or alteration of certain provisions which are of a merely temporary character, or affect the machinery with which the parliament or legislatures have to operate—such as the readjustment of representation, the elections and trial of controverted elections, the constitution of executive authority in Nova Scotia and New Brunswick, and other matters which do not really affect the fundamental principles of the constitution. All those provisions which constitute the executive authority of the Dominion, regulate the terms of union, and define the limits of the jurisdiction of the several governments, are unalterable except by the supreme legislature of the empire.

We have now to consider, in the first place, the position that the Dominion of Canada occupies in the Empire, and then the relations its government occupies towards the governments of the provinces, with such remarks on the powers and

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<sup>1</sup>The act of 1867 has been amended by two acts, Imp. Stat. 38-39 Vict., c. 38, to remove certain doubts with respect to the power of the Canadian parliament under section 18; and 34 and 35 Vict., c. 28, to remove doubts as to the powers of the Canadian parliament, to establish provinces in the territories.



functions and practical operation of the Constitution as are necessary to make the system intelligible.

The Queen is the head of the executive authority and government of Canada.<sup>1</sup> She is as much the sovereign of Canada as of England or Scotland, and her supremacy can be alone acknowledged in all executive or legislative acts of this dependency. As she is unable to be present in person in Canada, she is represented by a governor-general appointed by Her Majesty in council. In the following chapter I shall refer to his duties in Canada, and it is therefore pertinent here to make only a few necessary references to his imperial position.

This high functionary, generally chosen from public men of high standing in England, has dual responsibilities, for he is at once the governor-in-chief of a great dependency, who acts under the advice of a ministry responsible to parliament, and at the same time the guardian of imperial interests. He is bound by the terms of his commission, and can only exercise such authority as is expressly or impliedly entrusted to him.<sup>2</sup> He must report regularly on all those imperial and other matters on which the secretary of state for the colonies should be informed. For instance, in the negotiations for the recent fishery treaty he was the avenue for all communications between the Canadian and imperial governments. Canada being a colony, and not a sovereign state, cannot directly negotiate treaties with a foreign power, but must act through the intermediary of the imperial authorities, with whom the governor-general, as an imperial officer, must communicate on the part of our government not only its minutes of council, but his own opinions as well, on the question under consideration. In case of bills reserved<sup>3</sup> for the consideration of the imperial

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<sup>1</sup> B. N. A. Act, sec. 9. "The executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

<sup>2</sup> *Musgrove v. Pulido*, 5 App. Cas., 102.

<sup>3</sup> A bill affecting the fishery dispute between Canada and the United States was formally reserved in 1886.

government he forwards them to the secretary of state with his reasons for reserving them. The British North America act provides indeed that copies of all acts of the Canadian parliament should be transmitted to the secretary of state for the colonies, that they may be duly considered and disallowed within two years<sup>1</sup> in case they are found to conflict with imperial interests and are beyond the legitimate powers of Canada as a dependency, still in certain essential respects under the control of the imperial state. The commission and instructions, which the governor-general receives from the Queen's government, formerly contained a list of bills which should be formally reserved, divorce bills among other measures; but since the passage of the British North America Act, and the very liberal measure of self-government now conceded to Canada, these instructions have been materially modified,

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<sup>1</sup> B. N. A. Act, 1867, sec. 55. Where a bill passed by the houses of the parliament is presented to the governor-general for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this act and to her majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

56. Where the governor-general assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the act to one of her majesty's principal secretaries of state, and if the Queen in council, within two years after receipt thereof by the secretary of state, thinks fit to disallow the act, such disallowance (with a certificate of the secretary of state of the day on which the act was received by him) being signified by the governor-general, by speech or message to each of the houses of the parliament or by proclamation, shall annul the act from and after the day of such signification.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the governor-general for the Queen's assent, the governor-general signifies, by speech or message to each of the houses of the parliament or by proclamation, that it has received the assent of the Queen in council.

An entry of every such speech, message, or proclamation shall be made in the journal of each house, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the records of Canada.

and it is only in very exceptional instances that bills are expressly reserved. The general power possessed by the imperial government of disallowing any measure, within two years from its receipt, is considered as a sufficient check, as a rule, upon colonial legislation. The cases where a bill is disallowed are now exceedingly limited. Only when the obligations of the Empire to a foreign power are affected, or an imperial statute is infringed in matters on which the Canadian parliament has not full jurisdiction, is the supreme authority of England likely to be exercised.

The imperial parliament has practically given the largest possible rights to the Dominion government to legislate on all matters of a Dominion character and importance which can be exercised by a colonial dependency ; and the position Canada consequently occupies is that of a semi-independent power. Within the limits of its constitutional jurisdiction, and subject to the exercise of disallowance under certain conditions, the Dominion parliament is in no sense a mere delegate or agent of the imperial parliament, but enjoys an authority as plenary and ample as that great sovereign body in the plenitude of its power possesses.<sup>1</sup> This assertion of the legislative authority of the Dominion legislature is quite reconcilable with the supremacy of the imperial parliament in all matters in which it should intervene in the interest of the empire. For that parliament did not part with any of its rights as the supreme authority of the empire, when it gave the Dominion government "exclusive authority" to legislate on certain classes of subjects enumerated in the act of union, and to which we shall later on refer at length. This point has been clearly explained by Mr. Justice Gray of the supreme court of British Columbia, whose opinion as an eminent judicial authority is strengthened by the fact that he was one of the members of the Quebec convention of 1864. In deciding against the constitutionality of

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<sup>1</sup> See *Regina vs. Burah*, 3 App. Cas., 889 ; *Hodge vs. the Queen*, 9 Ib., 117.

the Chinese tax bill, passed by the legislature of his province, he laid down that "the British North America Act (1867) was framed, not as altering or defining the changed or relative positions of the provinces towards the imperial government, but solely as between themselves." Proceeding he said that the imperial parliament "as the paramount or sovereign authority could not be restrained from *future* legislation. The British North America Act was intended to make legal an agreement which the provinces decided to enter into as between themselves, but which, not being sovereign states, they had no power to make. It was not intended as a declaration that the imperial government renounced any part of its authority."<sup>1</sup>

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<sup>1</sup> Judgment of Mr. Justice Gray on the Chinese tax bill, Sept. 23d, 1878.

An imperial statute passed in 1865 (28 and 29 Vict., c. 63) expressly declares that any colonial law "in any respect repugnant to the provisions of any act of parliament extending to the colony to which such law may relate," shall to the extent of such repugnancy be "absolutely void and inoperative." And in construing an act of parliament, "it shall be said to extend to any colony, when it is made applicable to such colony by the express words or necessary intendment" of the same. Since the passage of this act Canada has received a larger measure of self-government in the provisions of the B. N. A. act, which confers powers on the Dominion and the provincial authorities. No one can doubt that it is competent, as Mr. Justice Gray has intimated, for parliament to pass any law it pleases with respect to any subject, within the powers conferred on the Dominion or provinces: and any enactment repugnant to that imperial statute would be declared null and void by the courts, should the question come before them. But the point has been raised, whether it is in the power of the Canadian parliament or legislatures to pass an act repealing an imperial statute passed previous to the act of 1867, and dealing with a subject within the powers granted to the Canadian authorities. It must be here mentioned that the imperial government refused its assent to the Canadian copyright act of 1872, because it was repugnant, in the opinion of the law officers of the Crown, to the provisions of an imperial statute of 1842 extending to the colony (Imp. Stat., 5 and 6 Vict., c. 45; Can. Sess. P., 1875, No. 28). On the other hand, in the debate on the constitutionality of the Quebec Jesuits' bill mentioned later on, it was contended by the minister of justice that a provincial legislature "legislating upon subjects which are given it by the B. N. A. act, has the power to repeal an imperial statute, prior to the B. N. A. act, affecting those subjects." In support of this position he



But, as I have already shown, this supreme authority of the imperial government will be exercised only in cases where interference is necessary in the interests of the Empire, and in the discharge of its obligations towards foreign powers. In the case of all matters of Dominion or Canadian concern, within the rights and privileges extended to Canadians by the British North America Act, and in accord with the general policy now pursued towards all colonies exercising a full system of local self-government, the imperial authorities can constitutionally claim no authority whatever. That is, they can interfere, to quote a distinguished Canadian statesman, "only in instances in which, owing to the existence of substantial imperial, as distinguished from Canadian, interests it is con-

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referred to three decisions of the judicial committee of the privy council. One of these, in *Harris vs. Davies* (10 App. Cas., p. 279), held that the legislature of New South Wales had power to repeal a statute of James I. with respect to costs in case of a verdict for slander. The second case was *Powell vs. Apollo Candle Co.* (10 App. Cas., p. 282), in which the principles laid down in *Regina vs. Burah* (3 App. Cas., 889) and in *Hodge vs. the Queen* (9 App. Cas., p. 117) were affirmed. The third and most important case as respects Canada was the *Queen and Riel* (10 App. Cas., p. 675), in which it was decided that the Canadian parliament had power to pass legislation changing, or repealing (if necessary) certain statutes passed for the regulation of the trial of offences in Rupert's Land, before it became a part of the Canadian domain (see Sir J. Thompson's speech, Can. Hansard, March 27, 1889). But several high authorities do not appear to justify the contention of the minister of justice. See Hearn's *Government of England*, app. II.; "The Colonies and the Mother Country;" Todd's *Government in the Colonies*, pp. 188-192, etc.; Dicey's *Law of the Constitution*, pp. 95, *et seq.* The question is too important to be treated hastily, especially as it will come up soon in connection with the copyright act of 1889, in which the same conflict as in 1875 arises. No doubt the fundamental principle that rests at the basis of our constitutional system is to give Canada as full power over all matters affecting her interests as is compatible with imperial obligations. The parliament and legislatures must necessarily repeal, and have time and again repealed, imperial enactments, especially those not suitable to the circumstances of the country. See debate of April 20, 1889, Canadian Commons, on the new copyright bill, which by sec. 7 can only come into force by a proclamation of the governor in council.

sidered that full freedom of action is not vested in the Canadian people.”<sup>1</sup>

The complete freedom of action now enjoyed by Canada in matters affecting the commercial interests of the empire, can be understood by reference to the fiscal system now in operation in Canada. This system, generally known as the “National Policy,” since its adoption in 1879, imposes a protective tariff, which is in direct antagonism with the free trade policy of the parent state, and is chiefly intended to assist Canadian manufactories against British and foreign competition. This policy, at the outset, was naturally received with much disfavor in England, but when an appeal was directly made in the imperial house of commons to disallow it, the secretary of state for the colonies, on the part of the government, presented, as a reason for non-interference, that the measure in question was not in excess of the rights of legislation guaranteed by the British North America Act, under which (subject only to treaty obligations), the fiscal policy of Canada rests with the Dominion parliament. He further stated that, however much the government might regret the adoption of a protective system, they did not feel justified in opposing the wishes of the Canadian people in this matter.<sup>2</sup>

The queen’s privy council of England has also the right to allow appeals to the judicial committee—one of the survivals of the authority of an ancient institution of England—from the courts of Canada. This right is only exercised on principles clearly laid down by this high tribunal, but it is

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<sup>1</sup> Hon. Mr. Blake in a despatch to the secretary of state for the colonies. Can. Sess. P., 1877, No. 13, p. 8.

<sup>2</sup> “The clause with respect to differential duties, (English Hans. Deb., Vol. 244, p. 1311), is now left out of the governor-general’s instructions, and the imperial government are content to rely upon the prerogative right of disallowance, as a sufficient security against the enactment of any measure by the parliament of Canada, that should be of such character as to call for the interposition of the royal veto.” Todd’s Parl. Government in the Colonies, p. 187.

emphatically a right to be claimed by the Canadian people as forming part of the empire under the sovereignty of England. It is a right sparingly exercised, for the people of Canada have great confidence in their own courts, where justice is administered with legal acumen and strict impartiality ; but there are decided advantages in having the privilege of resorting in some cases, especially those affecting the constitution, to a tribunal which is generally composed of men whose great learning illustrates all those traditions which make the decisions of England's courts respected the world over.

In the foregoing paragraphs I have mentioned the relations that should naturally exist between the supreme head of the empire and its colonial dependencies. I may here add, what will be obvious to every one, that the power over peace and war, and the general control of such subjects as fall within the province of international law, are vested in the home government, and cannot be interfered with in the least degree by the government of the Dominion.

With these exceptions which limit the jurisdiction of the Dominion as a dependency, Canada possesses under the British North America Act, and in accordance with the general policy of England towards her self-governing colonies, a practically sovereign authority within the limits of her territory, and has assumed all the proportions of an empire. Her constitution enables her to establish new provinces with complete systems of government, as large as any of the commonwealths of the American Republic. The province of Manitoba has already been formed out of the North-west Territories acquired in 1870 from the company of Hudson Bay adventurers who held a charter from the days when sovereigns recklessly granted their followers vast areas of lands, larger than the great kingdoms of Europe. The territories are regulated by the Dominion and granted from time to time such privileges as are commensurate with their increasing population and capacity to carry on a system of local self-government. The Dominion appoints the governors of the provinces

and can dismiss them under the provisions of the constitution, occupying in this respect the position that England formerly held with reference to the provinces before the union of 1867.

Perhaps no one fact more clearly illustrates the important position which Canada has attained within a few years, than the recognition by the imperial government of her absolute right to be consulted, and have a direct voice in the negotiation of all treaties which immediately affect her interests. In the arrangement of the Washington treaties of 1871 and 1888, which dealt with the question of the fisheries—still unhappily unsettled owing to the refusal of the Senate to ratify the last treaty—Canada was represented by one of her ablest statesmen in each case.<sup>1</sup> In negotiations between Canada, France and Spain for a commercial treaty, the imperial government specially commissioned the Canadian high representative in London with full powers to act. The appointment of the high commissioner of Canada was of itself a concession to the growing importance of Canada as a dependency of the empire and of the consequent necessity that has arisen of having in London a representative who would occupy a higher position than the previous agents of the colonies. In the case of all treaties affecting Canada directly, their ratification depends on the assent of her parliament.<sup>2</sup> In fact, the history of all imperial legislation with respect to extradition and other treaties, also proves the desire of the imperial authorities to give due scope to Canadian legislation as far as it is compatible with

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<sup>1</sup>In 1871 by Sir John Macdonald, then as now, Premier. In 1888 by Sir Charles Tupper, now High Commissioner of Canada in London.

<sup>2</sup>See Can. Stat. for 1888 (treaty of Washington), c. 3, sec. 3, and art. xvi of schedule. The 132d section of the B. N. A. Act provides: "The parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the empire and such foreign countries." Also comments of Dr. Todd in *Parl. Govt. in Colonies*, p. 205.



the interests of the empire. In some treaties it is expressly stipulated that they shall be only applicable to the colonial possessions "so far as the laws, for the time being, in force in such colonies will allow."<sup>1</sup> The large measure of self-government that Canada enjoys in other particulars will be seen in the course of these lectures.

We come now to consider the nature of the federal system, the respective powers of the dominion and provincial governments, and the relations that they bear to one another under the constitution. We have already seen by the three resolutions of the Quebec conference that I have cited, that the object of the founders of the union was to give to the central authority the control over matters of general or *quasi* national importance, and to the provincial governments jurisdiction over matters of a local or provincial nature. In arranging the details of the union the framers were naturally called upon to study carefully the American constitution in its origin and development. In 1864 the civil war was not yet brought to a close, and statesmen, the world over, were naturally in doubt as to its effects on the constitution and union at large. Canadian statesmen saw that ever since the foundation of the weak confederation of 1775, and of the constitution that was subsequently adopted in 1787, to give efficiency, strength and permanency to the union,—“to form a more perfect union,” in the language of its preamble,—a great struggle had been going on between the national and the state governments for the supremacy. They saw that certain states had persistently asserted the doctrine of State sovereignty, and the right of nullifying or refusing to be bound by certain acts of the national government. Nullification and secession, it was seen, were justified by lawyers and statesmen, as the last resort of sovereign states, when what was believed to be their inherent rights were invaded by the national government. The statesmen that assembled at Quebec believed that it was a defect in

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<sup>1</sup> See treaty with Russia in Can. Statutes for 1887.

the American constitution to have made the national government alone one of enumerated powers, and to have left to the States all the powers not expressly taken from them.<sup>1</sup>

For these reasons mainly the powers of both the Dominion and the Provincial governments are stated, as far as practicable, in express terms with the view of preventing a conflict between them; the powers that are not within the defined jurisdiction of the provincial governments are reserved in general terms to the central authority. In other words "the residuum of power is given to the central instead of to the state authorities." In the British North America Act we find set forth in express words:

1. The powers vested in the Dominion government alone;
2. The powers vested in the provinces alone;
3. The powers exercised by the Dominion government and the provinces concurrently;
4. Powers given to the Dominion government, in general terms.

The powers vested in the parliament of Canada are set forth in the ninety-first section of the constitution, which enacts that the Queen with the advice and consent of the Senate and House of Commons may "make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:

1. The public debt and property.
2. The regulation of trade and commerce.

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<sup>1</sup>See remarks of Sir John Macdonald, then attorney-general, now premier of Canada: Confederation debates, p. 33.

3. The raising of money by any mode or system of taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The census and statistics.
7. Militia, military and naval service and defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada.
9. Beacons, buoys, lighthouses and Sable Island.
10. Navigation and shipping.
11. Quarantine and the establishment and maintenance of marine hospitals.
12. Sea-coast and inland fisheries.
13. Ferries between a province and a British or foreign country, or between two provinces.
14. Currency and coinage.
15. Banking, incorporation of banks and the issue of paper money.
16. Savings banks.
17. Weights and measures.
18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians and lands reserved for the Indians.
25. Naturalization and aliens.
26. Marriage and divorce.
27. The criminal law, except the constitution of the courts of criminal jurisdiction, but including the procedure in criminal matters.
28. The establishment, maintenance, and management of penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces."

And the section concludes, with the view obviously of giving more definiteness to its provisions and to lessen the chances of conflicts of jurisdiction with the provincial authorities, that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces."

Having, as they believed, definitely stated the general powers that appertain naturally to a central government, exercising jurisdiction over the whole Dominion, the framers of the Act defined in the ninety-second section the powers that the local governments can exercise within their constitutional limits.

The legislature may, in each province, "exclusively make laws" in relation to the classes of subjects enumerated as follows :

1. The amendment, from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of lieutenant-governor.

2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

3. The borrowing of money on the sole credit of the province.

4. The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.

5. The management and sale of the public lands belonging to the province, and of the timber and wood thereon.

6. The establishment, maintenance and management of public and reformatory prisons in and for the province.

7. The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals.

8. Municipal institutions in the province.

9. Shop, saloon, tavern, and auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes.



10. Local works and undertakings other than such as are of the following classes :

*a.* Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province ;

*b.* Lines of steamships between the province and any British or foreign country ;

*c.* Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.<sup>1</sup>

11. The incorporation of companies with provincial objects.

12. Solemnization of marriage in the province.

13. Property and civil rights in the province.

14. The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

15. The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

16. Generally all matters of a merely local or private nature in the province.

A careful consideration of the foregoing section will show how large and important a measure of local self-government is given to all the provincial members of the confederation. It was the object of the framers of the constitution to leave to

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<sup>1</sup> In 1883 the parliament of Canada passed an act declaring certain railways to be "works for the general advantage of Canada" within the meaning of the section. (See Bourinot's *Parliamentary Practice in Canada*, pp. 587-589). This subject was ably argued before the Supreme Court of Canada in 1888. See Hon. Mr. Blake's argument in the *Manitoba case*.

the old provinces as many of those powers and privileges that they exercised before the confederation, as are necessary to the efficient working of a local government and at the same time to give the central power effective control over all matters which give unity and permanency to the whole federal organization, of which the provincial entities form political parts or divisions. It will be seen, however, that the all important question of education does not fall within the enumeration of matters belonging to provincial legislation, which I have just given, although it is above all others a subject of local or provincial interest. The reason for this must be sought in the political history of the question.

While the different provinces before confederation were perfecting their respective systems of education, the question of separate schools attained a great prominence. The Protestant minority in Lower Canada, and the Roman Catholic minority in Upper Canada, earnestly contended for such a separation as would give the Protestants, in the former, and the Roman Catholics, in the latter province, control of their own schools, and not oblige the children of the two distinct religious beliefs to mix together. The religious instruction which the Roman Catholics consider inseparable from any public school system could not be accepted by the Protestants. Non-sectarian schools are at direct variance with the principles of the Roman Catholic Church. Finally, in all the provinces, except New Brunswick and Prince Edward Island, separate schools obtained at the time of the union, and it accordingly became necessary to give the minorities guarantees for their continuance, as far as such could be given in the constitution. The British North America Act now provides that while the legislature of a province may exclusively make laws on the subject of education, nothing therein shall prejudicially affect any of the denominational schools in existence before July, 1867. An appeal lies to the governor-general in council from any act of the provincial authority affecting any legal right or privilege that the Protestant or Roman Catholic minority

enjoyed at the time of the union. In case the provincial authorities refuse to act for the due protection of the rights of minorities, in accordance with the provisions of the constitution, then the parliament of Canada may provide a remedy for the due execution of the law provided in this behalf.<sup>1</sup> Parliament, so far, has not been called upon to act on the provisions of this section. The questions that arose in 1872 and in subsequent years, with respect to the New Brunswick school act of 1871, providing for a compulsory rating and assessment for non-sectarian schools, did not come under the law, for the Roman Catholics of New Brunswick did not enjoy separate privileges from other classes of their fellow-citizens previous to confederation; and all the authorities of the Dominion, as well as of England, the minister of justice of Canada, the

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<sup>1</sup> B. N. A. Act, 1867, sec. 93. In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

- (1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union;
- (2.) All the powers, privileges and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects, shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec;
- (3.) Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the governor-general in council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;
- (4.) In case any such provincial law as from time to time seems to the governor-general in council requisite for the due execution of the provisions of this section is not made, or in case any decision of the governor-general in council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the governor-general in council under this section.

courts, and the colonial secretary of state, and the judicial committee of the privy council, concurred in the opinion that the legislature had a right to enforce the assessments objected to by the Roman Catholics of the province, and had acted legally within the powers conferred upon them by the act of confederation.<sup>1</sup>

The Dominion and Local governments also exercise certain rights in common. Among the subjects on which they have concurrent powers of legislation are agriculture and immigration.<sup>2</sup> The dominion parliament may make laws on these subjects for any and all of the provinces, and each legislature may do the same for the province over which it has jurisdiction, provided no provincial act is repugnant to any dominion act. These provisions have so far worked in the interests of the provinces separately and of the dominion as a whole. Both these authorities are equally interested in the promotion of matters so deeply affecting the development of the natural resources of all sections. The provinces, excepting Manitoba, have the control of their lands and mines, while the dominion is interested in the opening up of the vast territorial area which it has in the north-west; and it is consequently clear that these concurrent powers are wisely arranged in the constitutional act.

If we study the two sections, enumerating the respective powers that fall within the jurisdiction of the dominion parliament and the provincial legislatures, we shall see that there are certain subjects, which may, as the operation of the act

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<sup>1</sup> For history of this case see Todd's *Parl. Govt. in Colonies*, pp. 346-352.

<sup>2</sup> B. N. A. Act, 1867, sec. 95. In each province the legislature may make laws in relation to agriculture in the province, and to immigration into the province; and it is hereby declared that the parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the legislature of a province, relative to agriculture or to immigration, shall have effect in and for the province, as long and as far only as it is not repugnant to any act of the parliament of Canada.



proves, fall, under certain limitations, within the province of both. For instance, there is insurance, on which both the dominion government and provincial authorities have fully legislated—the former under the general provision giving it the jurisdiction over “the regulation of trade and commerce;” the latter under the very wide right to incorporate companies “with provincial objects.” The question of jurisdiction has been decided by the courts of Canada, and affirmed by the privy council, and principles laid down of much importance since they serve to prevent conflict of authority on other subjects and give each jurisdiction that power which it should exercise in accord with the general spirit of the constitution. It is now authoritatively decided that the terms of the eleventh paragraph of the ninety-second section are sufficiently comprehensive to include insurance companies, whose object is to transact business within provincial limits.

If a company desires to carry on operations outside of the province it will come under the provisions of the general federal law, to which it must conform and which contains special provisions for such purposes. But the authority of the dominion parliament to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province. Therefore while the dominion parliament may give power to contract for insurance against loss or damage by fire, the form of the contract and the rights of the parties thereunder, must depend upon the laws of the country or province in which the business is done.<sup>1</sup>

Although the Dominion parliament has exclusive jurisdiction over the criminal law, the local legislatures must necessarily have it within their power, as provided for in the act, to

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<sup>1</sup> See Cartwright's cases on B. N. A. Act, vol. I., pp. 265–350; 4 App. Rep. Ontario, 96, 103; 43 U. C. Q. B. 261, 271; Sup. Court R., vol. IV., pp. 215–349; 45 L. T. N. S., 721.

impose punishment by fine, penalty or imprisonment, for enforcing any law of the province within its legislative authority. The legislature may add "hard labor" to confinement or restraint in prison in legislating on a subject within its jurisdiction. Such a power is not in conflict with the authority of the dominion parliament over criminal matters.<sup>1</sup> This seems a necessary incident to a legislative power. It is a principle which parliament itself applies with respect to civil rights over which the legislatures have exclusive jurisdiction. All the legislative authorities must act, however, within their constitutional spheres, and not push their pretensions to extremes. As in the insurance case just mentioned, powers should be sought from each legislative body within its constitutional limits. Nor should parliament interfere with such details of an organization as are wholly within the jurisdiction of a provincial sovereignty.<sup>2</sup>

It must necessarily happen in the operation of a written constitution like ours that conflicts of jurisdiction will arise in cases where the respective powers of the distinct legislative authorities are not sufficiently defined. Sometimes it is difficult, while the constitution is working itself out, to decide where the jurisdiction rightly lies. The difficulty that may arise in such cases can be seen by reference to the decisions of the Canadian courts and of the judicial committee of the privy council on questions affecting the traffic in intoxicating liquors. The privy council has decided that the Canada temperance act of 1878 which, in effect, authorizes the inhabitants of each town, parish or county to prohibit or to regulate the sale of liquor, and to direct for whom, or for what purposes, and under what conditions, spirituous liquors may be sold therein, does not deal with matters of a purely local nature, nor with property nor civil rights, nor with the raising of a revenue for pro-

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<sup>1</sup> See *Hodge vs. the Queen*, 9 App. Cas., 117.

<sup>2</sup> Remarks of Sir John A. Macdonald, Mr. Blake and others, *Can. Hansard*, 1883, pp. 499, 500.

vincial, local or municipal purposes, as assigned exclusively to the jurisdiction of the provincial legislatures; but is rather one of those subjects relating to public order and safety which fall within the general authority of parliament to make laws for "the order and good government" of Canada. On the other hand, the same body has decided that it is competent for a legislature of a province to pass an act regulating the issue of licenses for the sale of liquor in the municipalities of a province, and authorizing the appointment of commissioners to define, by resolutions, the conditions and qualifications required to obtain licenses. This learned body has pointed out that the powers of such a provincial act are confined in its operations to municipalities in a province, and entirely local in its character, and in fact identical for the most part with the powers that belonged to municipal institutions under the laws that had been passed by the legislatures previous to confederation. In short, such an act was considered, by their Lordships, as in the nature of police and municipal regulations, calculated to preserve in the municipality peace and public decency, to repress drunkenness and disorderly and riotous conduct.<sup>1</sup> These decisions, to a certain extent, dealing as they do with cognate subjects, will perplex the ordinary lay mind not accustomed to legal subtilties; and there are those who say<sup>2</sup> that in the first decision their Lordships had not the benefit of a very complete argument in favor of the contention

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<sup>1</sup> See 7 App. Cas., 829 : *Legal News*, January 19th, 1884.

<sup>2</sup> The late Mr. Justice Henry, one of the authors of the confederation, in a judgment on a cognate question, reiterated the opinion he had expressed on the Canada Temperance act, that the British North America act, "if read in the light which a knowledge of the subject before the passage of that act would produce, plainly gives the power of legislation to the local legislatures in respect of licenses." His whole argument went to show "the right to make laws for the peace, &c., of Canada is as fully restricted to such subjects as do not come within the classes of subjects assigned to the legislatures of the provinces as language can make it;" and that the privy council did not give due consideration to the power of the legislatures over those special subjects. Sup. Court R., vol. XI., pp. 33-39.

for local jurisdiction, and hardly well appreciated the full weight that should be given to the paragraph giving the provinces complete jurisdiction over all matters of a merely local or private nature in a province. At all events, the second decision has recommended itself as in harmony with the general spirit of local powers granted to the provincial legislatures. As it was, the immediate effect of these decisions, in a measure involving contradictions, was to throw the liquor-licensing legislation of the country into much confusion; for the Dominion government considered itself justified in passing a general license act, which subsequently was declared *ultra vires*, except where the act dealt with wholesale and vessel licenses, or carried into effect certain provisions of the Canada Temperance act.<sup>1</sup>

The conclusion we come to after studying the operation of the constitutional act, until the present time, is that while its framers endeavored to set forth more definitely the respective powers of the central and local authorities than is the case with the constitution of the United States, it is not likely to be any more successful in preventing controversies constantly arising on points of legislative jurisdiction. The American constitution is remarkable for its precision, the generality of its principles, the avoidance of too many details, and the elasticity of which it is capable when applied to the needs and exigencies of the nation and states. The effort was made in the case of the Canadian constitution to go in the other direction, and more fully define the limits of the authority of the dominion and its political parts; but while great care was evidently taken to prevent the dangerous assertion of provincial rights, it is clear that it has the imperfections of all statutes, when it is attempted to meet all emergencies. Happily, however, by means of the courts in Canada, and the tribunal of last resort in England, and the calm deliberation which the parliament is

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<sup>1</sup>See Bourinot's Manual of Constitutional History, pp. 139-146.



learning to give to all questions of dubious jurisdiction, the principles on which the federal system should be worked are, year by year, better understood and the dangers of continuous conflict lessened. It is inevitable, if we are to judge from the working of a federal system in the United States, that there should be, at times, a tendency either to push to extremes the doctrine of the subordination of the provinces to the central power, or on the other hand to claim powers on behalf of the provincial organizations, hardly compatible with their position as members of a confederation based on the principle of giving complete jurisdiction to the central government over all matters of national and general import. It is obvious that in certain legislation the Dominion parliament must trench upon some of the powers exclusively given to the local organizations, but it cannot be argued, with a due regard to the true framework of the constitutional act and the principles that should govern a federal system like ours, that the powers of the provinces should be absorbed by the dominion or central authority in cases of such apparent conflict. Referring to this point the privy council calls attention to the fact that the general subject of "marriage and divorce" is given to the jurisdiction of the dominion parliament, and the "solemnization of marriage" to the legislature of a province. It is evident that the solemnization of marriage would come within the general description of the subject first mentioned; yet no one can doubt, notwithstanding the general language of the ninety-first section, that this subject is still within the exclusive authority of the legislatures of the provinces. "So," continues the privy council, "the raising of money by any mode or system of taxation is enumerated among the classes of subject in section ninety-one, but though the description is sufficiently large and general to include direct taxation within the province in order to aid the raising of a revenue for provincial purposes assigned to the provincial legislatures by the ninety-second section it obviously could not have been intended

that in this instance also the general power should override the particular one.”<sup>1</sup>

It is now laid down by the highest judicial authorities that the dominion parliament has the right to interfere with “property and civil rights” in so far as such interference may be absolutely necessary for the purpose of legislating generally and effectually in relation to matters confided to the parliament of Canada. Laws designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of parliament, to make laws for the good order and government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the parliament of Canada. Few if any laws could be made by the parliament for the peace, order and good government of Canada which might not, in some incidental way, affect property and civil rights; and it could not have been intended when assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude the parliament from the exercise of this general power whenever any such incidental interference would result from it.<sup>2</sup> As on the one hand the federal parliament cannot extend its own jurisdiction by a territorial extension of its laws, and legislate on subjects constitutionally provincial, by enacting them for the whole dominion; so, on the other hand, a provincial legislature cannot extend its jurisdiction over matters constitutionally federal, by a territorial limitation of its laws and legislate on matters left to the federal power, by enacting them for the province only, as for instance. incorporate a bank for the province.<sup>3</sup>

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<sup>1</sup> L. T. N. S., 721 : Cartwright, vol. I., pp. 272, 273.

<sup>2</sup> 7 App. Cas., 829.

<sup>3</sup> Can. Sup. Court R., IV., 310.

When the British North America Act enacted that there should be a legislature for a province, and that it should have exclusive authority to make laws for the provinces and for provincial purposes in relation to the matters enumerated in the ninety-second section, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the imperial parliament, but authority as plenary and as ample within the limits prescribed by the section, as the imperial parliament, in the plenitude of its power, possesses and could bestow.<sup>1</sup>

In short, each legislative body should act within the legitimate sphere of its clearly defined powers, and the dominion parliament should no more extend the limits of its jurisdiction, by the generality of the application of its law, than a local legislature should extend its jurisdiction by localizing the application of its statutes.<sup>2</sup>

I might cite other opinions bearing on the same important question, but I have already given enough to show the principles that should generally prevail if the federal constitution is to be efficiently carried out with a true consideration of all the interests involved.<sup>3</sup> The federal government should work in harmony with provincial institutions, and by leaving them full scope within the limits of the constitution at once give strength and stability to the central government and confidence to the various local organizations without which it could not exist.

In one most important respect the dominion government exercises a direct control over the legislation of each province. While the imperial government can disallow any act of the

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<sup>1</sup> 9 App. Cas., 117; Cartwright, vol. III., p. 162.

The same power exists in the States. "When a particular power," says Judge Cooley, "is found to belong to the States, they are entitled to the same complete independence in its exercise as the national government in wielding its own authority."

<sup>2</sup> *Legal News* (the late Mr. Justice Ramsay) on *Hodge vs. the Queen*, January 26th, 1884.

<sup>3</sup> See Bourinot's *Manual of Constitutional History*, chap. XIV.

Canadian parliament at variance with the interests of the Empire, the governor in council can, within one year from its receipt, disallow any act of a provincial legislature. Here is one of the evidences which the constitution affords of the subordinate position in certain particulars of the provincial authorities. It illustrates the fact that the dominion government now occupies those relations towards the provincial governments that England, before the confederation, held with reference to the provinces, and still does in the case of all colonies outside of Canada. This power of disallowance is not limited in terms by the British North America Act,<sup>1</sup> but may be exercised even with respect to an act clearly within the constitutional jurisdiction of the provincial legislatures. It has so far been exercised in a very insignificant number of cases, compared with the vast amount of legislation that annually passes the provincial bodies; but in some of these cases it caused much irritation, notably in Manitoba, whose provincial railway acts were vetoed on several occasions on the ground that they were in conflict with obligations that the dominion had assumed towards the Canadian Pacific Railway. These restrictions were only removed after parliament had given the Pacific railway certain privileges as compensation for the removal of their railway monopoly in the north-west. From these and other instances of the exercise of this political power, the student will see that it is one to be exercised with great discretion and judgment, as otherwise it may involve conse-

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<sup>1</sup> Sec. 90. The following provisions of this act respecting the parliament of Canada, namely,—the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of acts and the signification of pleasure on bills reserved,—shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the lieutenant-governor of the province for the governor-general, of the governor-general for the Queen, and for a secretary of state, of one year for two years, and of the province for Canada.



quences fatal to the harmony and integrity of the confederation. This power can be properly exercised when the act under consideration is beyond the constitutional competency of the legislature, or when it is repugnant to dominion legislation in cases where there is concurrent jurisdiction, or when it is hostile to the rights enjoyed by a minority under the constitution, or when clearly hostile or dangerous to the peace and unity of the dominion generally. Before advising the governor-general on an act of dubious import, or only partially defective, the council must consider whether it will not be sufficient to inform the legislative body, responsible for its passage, of the objectionable features, and allow it to go into operation on the understanding that they will be removed by an amending act. Or in cases where the act is useful, though *ultra vires*, the government has recommended confirmatory legislation by the dominion parliament, or in matters of doubt they have been left to the courts to decide whenever a question should arise for their determination. The cases are so numerous when the dominion government is called upon to exercise its power of allowance or disallowance, that it is out of the question that I should here attempt to lay down with any accuracy, the various reasons and principles that should guide it in this important work of supervision. The danger arises from the exercise of the power, on the grounds of public policy, in the case of a question clearly within the constitutional powers of a legislature. The principle that should prevail, as a rule, is to leave to their operation all acts that fall within the powers of the provincial legislature, which within its legal sphere has as absolute a right of legislation as the dominion parliament itself; and if the dominion authorities, at any time, for sufficient reasons, consider it necessary to interfere in provincial affairs, they must be prepared to justify their action before parliament and the country, so deeply interested in the preservation of the union. Opinion is divided as to the wisdom of a provision which gives so sovereign a power to a political body, and it may be doubted if in this

respect our constitution is an improvement upon that of the United States. The veto is so much valued in the states that while originally only one state, Massachusetts, vested it in the governor, now all but four have it. The President vetoes the acts of Congress, which can, however, override his decision by a two-thirds vote in each house; and the governors in each state, as just remarked, exercise the same power with respect to state legislation. But the disallowance of state legislation by the executive at Washington, has never existed, and was never suggested in the case of the American federal system.<sup>1</sup>

The adoption of such a principle in 1787 would have been, in all probability, fatal to the passage of the constitution of the states, many of whom agreed to that measure with doubt and suspicion. They agreed, wisely, as experience seems to show, to leave the judicial branch of the constitution to determine the constitutionality of all acts of congress or of the legislature.

Political considerations cannot enter into this judicial determination. As long as a statute is within the constitutional jurisdiction of a body that passed it, the federal judiciary cannot do otherwise than so declare, even if it be objectionable at the time on grounds of public policy. The future will soon prove whether this extraordinary supervision, given to the dominion over the provinces, is calculated to strengthen

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<sup>1</sup> "While the constitution was being framed the suggestion was made, and for a time seemed likely to be adopted, that a veto on acts of state legislatures should be conferred upon the federal congress. Discussion revealed the objections to such a plan. Its introduction would have offended the sentiment of the states, always jealous of their autonomy; its exercise would have provoked collisions with them. The disallowance of a state statute, even if it did really offend against the federal constitution, would have seemed a political move, to be resented by a political counter-move. . . . But by the action of the courts the self-love of the states is not wounded, and the decision annulling their laws is nothing but a tribute to the superior authority of the supreme enactment to which they were themselves parties, and which they may themselves desire to see enforced against some other state on some not remote occasion."—Prof. Bryce's *American Commonwealth*, I., p 343.

the confederation, or has in it the elements of political discord and disunion. As long as the dominion and provincial governments are politically identified, the danger from conflict is minimized, but it is possible to suppose the case of violent antagonism between these governments when the central power might in a moment of passion or arrogance use its authority to check or thwart the government made subordinate to it in this particular. Happily, so far, the history<sup>1</sup> of this large power is not calculated to raise apprehensions that it is likely to be recklessly exercised; for the cases which have heretofore created much discussion, and even discontent, have been defended on grounds of public policy or the public faith, though the wisdom and soundness of that policy has been doubted by others who have looked at the whole question from a purely provincial point of view. The sound sense of the people must always prevail in a country like this, and keep all governments from unduly and rashly interfering with the constitutional rights of the different sections of the dominion, to whom has been granted such a complete system of local self-government as is compatible with the unity and permanency of the dominion at large.<sup>2</sup>

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<sup>1</sup> See correspondence, reports of the Ministers of Justice, and orders in council upon the subject of provincial legislation, 1867-1887, compiled under direction of the Ministers of Justice, by W. E. Hodgins, for a complete history of the exercise of this important responsibility thrown upon the dominion government.

<sup>2</sup> The inexpediency of disallowing any measure believed to be within the constitutional jurisdiction of a province was strongly asserted in the debate in the Canadian House of Commons in 1889, on the Quebec Statute, 51-52 Victoria, c. 13. "An act respecting the settlement of the Jesuits' Estates." The Jesuits had been suppressed by the Pope in 1773, and their property taken possession of in 1800 by the British government, which applied the revenues thereof to public instruction in the province of Lower Canada; but the Roman Catholic Church, always through its Bishops, contended that it should be vested with all the estates as a result of the suppression of the society. This body, however, has been reinstated in these later times, and an act of incorporation was granted it by the Quebec legislature in 1887. The Quebec government then carried through the first-mentioned

It is on the courts of Canada, aided by the ripe judgment and learning of the judicial committee of the privy council, we must, after all, mainly depend for the satisfactory operation of our constitutional act. The experience of the United States has shown the inestimable value of the decisions given by the judges of the supreme and the federal courts on questions that have arisen, from time to time, in connection with their con-

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act, authorizing the payment of \$400,000 as compensation for the sale of the estates formerly held by the Jesuits, and as a means of settling a long standing difficulty. These estates, it must be remembered, became the property of the province after confederation and were entirely at the disposal of the legislature.

The negotiations with the See of Rome, and the Society are formally set forth in the preamble of the act in the shape of correspondence between the Quebec government and the representatives of those religious bodies, and it is expressly stated that the agreement will be binding only in so far as it shall be ratified by the Pope and the Legislature, and the amount of compensation was to remain as a special deposit until the former had made known his wishes respecting its distribution. The government in treating on the question, did not "recognize any civil obligation but merely a moral obligation." Subsequently the funds were distributed by the Pope—the greater part to certain educational institutions in the province, and the remainder to the Society. Out of this settlement a heated controversy, involving old world and ancient issues, has arisen in Canada, and was transferred to parliament by a resolution, formally asserting that the government should have at once disallowed the act as beyond the power of the legislature because, among other things, "it recognizes the usurpation of a right by a foreign authority, namely, His Holiness, the Pope, to claim that his consent was necessary" to dispose and appropriate the public funds of a province. It was contended on the other hand that the Pope, as the head of the Church, was simply called upon to act as an arbitrator between the disputants in a matter in which the interests of the Church were involved. The inference that may be drawn from the debate on the whole question in the House of Commons is this: that the almost unanimous vote in favor of the course of the government in allowing the bill when it came formally before them (one hundred and eighty-eight against thirteen) was chiefly influenced by the conviction that the legislature of the province had an unquestionable right to dispose of its own funds as it might think proper, or in the words of the minute of council, approved by the governor-general, "the subject matter of the act is one of provincial concern, only having relation to a fiscal matter entirely within



stitution. The name of Chief Justice Marshall, especially, must be always associated with their fundamental law; for it is in a great measure owing to his great legal knowledge, to his broad views, to his capacity of comprehending the true spirit, scope and meaning of the principles laid down in the constitution, and to his ability to apply them to the circumstances that surrounded him at very critical times, that the

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the control of the legislature of Quebec.” In the course of the learned debate<sup>1</sup> that took place on the merits of this very vexatious issue a very clear exposition was given by several speakers from their respective points of view of the principles by which the relations between the dominion and the provincial governments should be governed. But there is another conclusion which I think may be fairly deduced from a debate of this character. An executive power which can be thus questioned in the political arena seems obviously fraught with perilous consequences. If all questions of the constitutionality of a provincial act could be decided only in the courts, parliament would be saved the discussion of matters, which, once mixed up with political and religious issues, must necessarily be replete with danger in a country like Canada, with a population nearly half Roman Catholic. In Canada and the United States, there is so much respect for the law and the bench that the people rarely question the wisdom of a judicial decision on any subject of importance. Can as much be said for the judgment of a political body, however honestly rendered it may be?

The following remarks of a very judicious writer, Professor Dicey, in the *Law of the Constitution*, (p. 166) may well be quoted in this connection: “The main reason why the United States have carried out the federal system with unqualified success is that the people of the union are more thoroughly imbued with constitutional ideas than any other existing nation. Constitutional questions arising out of either the constitutions of the several states or the articles of the federal constitution are of daily occurrence, and constantly occupy the courts. Hence the people become a people of constitutionalists; and matters which excite the strongest possible feeling,—as for instance, the right of the Chinese to settle in the country,—are determined by the judicial bench, and the decision of the bench is acquiesced in by the people. This acquiescence or submission is due to the Americans inheriting the legal notions of the common law; that is, of the most legal system of law, if the expression may be allowed, in the world.” See also Hare’s *American Constitutional Law*, vol. I., pp. 122, 123.

<sup>1</sup>See Canadian Hansard for April 26, 27 and 28, 1889.

union gained strength during the years he presided over the Supreme Court.<sup>1</sup>

The Quebec convention of 1864 appears to have fully appreciated the necessity of having a Supreme Court of Canada which would bear as much resemblance as possible to the American tribunal; for they agreed to a resolution, which is now embodied in the section of the British North America Act which provides "for the constitution, maintenance and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada." The Judiciary of Canada, from the lowest to the highest, can and do constantly decide on the constitutionality of acts, passed by the various legislative authorities of the Dominion. They do so in their capacity as judges and expounders of the law, and not because they have any especial commission, or are invested with any political powers or duties by the constitution.<sup>2</sup>

Unlike the United States, Canada has no federal courts established in the provinces, although the section just quoted seems to provide for some such courts, should they be considered necessary. The constitution, maintenance and organization of the courts in the provinces will be seen, by reference

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<sup>1</sup> Professor Bryce (*The American Commonwealth*, II., p. 1) very tersely shows the importance of the influence that the decisions of the supreme court have exercised on the constitution: "Hence, although the duty of the court is only to interpret, the considerations affecting interpretation are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness, but of a comprehension of the nature and methods of government which one does not demand from the European judge, who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American constitution, as it now stands, with the mass of foregoing decisions which explain it, is a far more complete and finished instrument than it was when it came first new from the hands of the convention. It is not merely their work but the work of the judges, and, most of all, of one man, the great Chief Justice Marshall."

<sup>2</sup> See II. Bryce, p. 184.

to the ninety-second section, to be within the matters placed under provincial jurisdiction, though the judges are appointed and paid by the dominion government, with the exception of the courts of probate in Nova Scotia and New Brunswick.<sup>1</sup>

In 1875, however, it was deemed advisable to pass an act providing for the establishment of a Supreme Court and Exchequer Court of Canada.<sup>2</sup> But the court is only a general court of appeal for Canada in a limited sense, since the existing right of appeal in the various provinces to the privy council has been left untouched. Nor can it be called a final court of appeal for Canada, since the privy council entertains appeals from its judgments by virtue of the exercise of the royal prerogative.<sup>3</sup> This court consists of a chief justice and five puisne judges, two of whom, at least, must be appointed from the bench or bar of the province of Quebec—a provision intended to give the court the assistance of men specially versed in French Canadian law. With certain exceptions set forth in the act, an appeal can lie to this court and from the highest court of final resort in a province. The governor-general in council may refer to the supreme court for hearing or consideration any matter which he deems advisable in the public interest;<sup>4</sup> but in certifying their opinion, the judges,

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<sup>1</sup> Secs. 96–97. The Maritime Court of Ontario is, however, a federal court.

<sup>2</sup> 38 Vict., ch. 11. The act was amended in 1887, by removing the Exchequer Court jurisdiction from the Supreme Court and giving it to a judge especially appointed for that purpose. 50–51 Vict., ch. 16.

<sup>3</sup> Cassell's Practice of the Supreme Court of Canada, p. 4.

<sup>4</sup> No such provision exists in the case of a federal judiciary. That branch of the government can be called upon "only to decide controversies brought before them in a legal form; and therefore are bound to abstain from any extra-judicial opinions upon points of law, even though solemnly requested by the executive. President Washington, in 1793, requested its opinion upon the constitution of the treaty with France of 1778; but they declined to give any opinion for the reasons just stated." Story's Commentaries (Cooley's ed.), § 1571.

Some of the state constitutions provide for a similar reference by the governor or legislature to the Supreme Court of the state. "The

following the practice of the judicial committee, do not give any reasons. On more than one occasion this power of referring a question, on which there is a legal or constitutional difficulty, has been found very useful to the parties interested, as well as to the country at large.<sup>1</sup> It is also provided that controversies between the dominion and any province, or between the provinces themselves, may be referred to the exchequer court, and on appeal from that court to the supreme court, and cases in which the question of the validity of a dominion or provincial act is shown to be material to the issue, may come within the jurisdiction of the court, whenever the legislature of one province has passed an act—as has been done by Ontario, Nova Scotia, and British Columbia—agreeing to such references. Either house of parliament may also refer to the court any private bill for its report thereon, but so far the senate alone has availed itself of this provision in the case of a bill of doubtful jurisdiction.<sup>2</sup>

It will be seen from this summary of the powers of the court that it is intended to make it, as far as practicable, a

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judges of the Supreme Court of Massachusetts suggest in their very learned and instructive opinion delivered to the legislature, December 31, 1878, that this provision, which appears first in the Massachusetts constitution of 1780, and was doubtless borrowed thence by the other states, evidently had in view the usage of the British constitution, by which the King as well as the House of Lords, whether acting in their judicial or in their legislative capacity, had the right to demand the opinion of the twelve judges of England. This is still sometimes done by the House of Lords; but the opinions of the judges are not necessarily followed by that House, and though always reported are not deemed to be binding pronouncements of law similar to the decisions of a court.” Bryce’s *American Commonwealth*, II., 48, 49.

<sup>1</sup>Cassell’s *Practice of the Supreme Court of Canada*, p. 4. The latest case of reference to the judges was one of a serious controversy between the government of Manitoba and the Canadian Pacific Railroad, which refused permission to a Manitoba railroad to cross its track; but this case was referred under section 99 of the Railway Act (57 Vict., c. 29, 1888). The question of the validity of the Liquor License Act was referred under sec. 26 of a special act, 47 Vict., c. 32.

<sup>2</sup>Bourinot’s *Parl. Practice in Canada*, pp. 606–607.



court for the disposal of controversies that arise in the working of the constitutional system of Canada. So far its decisions have won respect in Canada, and have been rarely overruled by the judicial committee of the privy council, which, by virtue of Her Majesty's royal prerogative, entertains appeals from the court where it is considered that any error of law has been made, and substantial interests have been involved.<sup>1</sup>

As I have in the first paragraph of this lecture referred to the importance of this appeal to the privy council, it is not necessary that I should dwell here on the subject.

I have now shown you the leading features of the constitutional relations that exist between the dominion and the provinces, and have stated some of the principles, as I understand them, that should guide the construction of the fundamental charter under which each authority acts. In other lectures, I shall review the duties and functions of the executive, administrative and parliamentary bodies by which the federal system is governed; but there are a few other points that properly fall within the scope of this lecture. First of all, and the most important in many ways, are the methods that the constitution provides for meeting the financial necessities of the dominion and of the provinces. The ninety-second section shows that the dominion parliament can raise money by any mode or system of taxation, borrow money on the public credit, issue paper money and regulate trade and commerce. Revenue is

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<sup>1</sup> See Sec. 71 of Supreme Court Act, which after setting forth that the judgment of the court shall be final, adds the proviso, "saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative. But by an act passed by the Canadian parliament in 1888, (51 Vict., c. 43) it is provided that "notwithstanding any royal prerogative" no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal in the United Kingdom. Exception was, I understand, taken to this act by the imperial authorities, but it does not appear to have been disallowed. This strong assertion of Canadian judicial independence rests on the powers given to the Canadian parliament by sections 91 (sub-s. 27) and 101 of B. N. A. Act, 1867.

accordingly raised principally from duties imposed on imports, and on certain articles, chiefly tobacco and liquors, manufactured in the dominion, and in addition to these there are certain minor revenues collected from the sale of lands in the north-west territories, over which the dominion government has exclusive control. All these moneys are paid into the treasury, and form what is known in law as "the Consolidated Revenue Fund of Canada," out of which are paid all the costs, charges and expenses incident to the collection and management of this fund, and all the expenses of government.<sup>1</sup>

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<sup>1</sup> B. N. A. Act, 1867, sec. 102. All duties and revenues over which the respective legislatures of Canada, Nova Scotia and New Brunswick before and at the union had and have power of appropriation, except such portions thereof as are by this act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this act, shall form one consolidated revenue fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this act provided.

103. The consolidated revenue fund of Canada shall be permanently charged with the costs, charges and expenses incident to the collection, management and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the governor-general in council until the parliament otherwise provides.

104. The annual interest of the public debts of the several provinces of Canada, Nova Scotia and New Brunswick at the union shall form the second charge on the consolidated revenue fund of Canada.

105. Unless altered by the parliament of Canada, the salary of the governor-general shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the consolidated revenue fund of Canada, and the same shall form the third charge thereon.

106. Subject to the several payments by this act charged on the consolidated revenue fund of Canada, the same shall be appropriated by the parliament of Canada for the public service.

107. All stocks, cash, bankers' balances, and securities for money belonging to each province at the time of the union, except as in this act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the provinces at the union.

108. The public works and property of each province enumerated in the third schedule to this act shall be the property of Canada.

These moneys are, in every instance, voted by parliament, but while certain sums are authorized annually by the appropriation act—which comprises the annual grants voted every session in supply—other payments are made under the sanction of statutes. These statutes, which are permanent and can only be repealed or amended by act of parliament, provide for salaries of the governor-general, lieutenant-governors, ministers of the crown, judges, and other high functionaries,

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109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

110. All assets connected with such portions of the public debt of each province as are assumed by that province, shall belong to that province.

111. Canada shall be liable for the debts and liabilities of each province existing at the union.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

113. The assets enumerated in the fourth schedule to this act, belonging at the union to the province of Canada, shall be the property of Ontario and Quebec conjointly.

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union eight million dollars, and shall be charged with the interest at the rate of five per centum per annum thereon.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

116. In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance from the government of Canada interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

117. The several provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of Canada to

whose remuneration it is understood should not depend on the annual votes. All moneys are paid out of the treasury under certain forms required by statute, and a thorough system of audit prevents any public expenditure not authorized by parliament, although the law permits the issue of governor-general's warrants in certain cases of emergency, but these, too, must at the first opportunity be laid before, and be sanctioned by parliament. Large sums are, at times, borrowed on

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assume any lands or public property required for fortifications or for the defence of the country.

118. The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures:

	DOLLARS.
Ontario - - - - -	Eighty thousand.
Quebec - - - - -	Seventy thousand.
Nova Scotia - - - - -	Sixty thousand.
New Brunswick - - - - -	Fifty thousand.

Two hundred and sixty thousand ;

and an annual grant in aid of each province shall be made, equal to eighty cents per head of the population as ascertained by the census of one thousand eight hundred and sixty one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two provinces amounts to four hundred thousand souls, at which rate such grants shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province; but the government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this act.

119. New Brunswick shall receive, by half-yearly payments in advance from Canada, for the period of ten years from the union, an additional allowance of sixty-three thousand dollars per annum; but as long as the public debt of that province remains under seven million dollars, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

120. All payments to be made under this act, or in discharge of liabilities created under any act of the provinces of Canada, Nova Scotia and New Brunswick respectively, and assumed by Canada, shall, until the parliament of Canada otherwise directs, be made in such form and manner as may from time to time be ordered by the governor-general in council.



the public credit, under the conditions laid down by parliament, in order to meet the heavy expenditures required for the extensive system of public works in which the dominion is engaged. The treasury also issues a number of notes, of which the sum of four dollars is the highest denomination—the banks of Canada being banks of issue for large sums within fixed limits—but the dominion issue in any one year may not exceed four million dollars, and the total amount issued and outstanding, at any time, may not exceed twenty millions, secured for redemption by gold and Canadian guaranteed securities.<sup>1</sup>

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121. All articles of the growth, produce or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces.

122. The customs and excise laws of each province shall, subject to the provisions of this act, continue in force until altered by the parliament of Canada.

123. Where customs duties are, at the union, leviable on any goods, wares or merchandises in any two provinces, those goods, wares and merchandises may, from and after the union, be imported from one of those provinces into the other of them, on proof of payment of the customs duty leviable thereon in the province of exportation, and on payment of such further amount (if any) of customs duty as is leviable thereon in the province of importation.

124. Nothing in this act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen of title three of the Revised Statutes of New Brunswick, or in any act amending that act before or after the Union, and not increasing the amount of such dues; but the lumber of any of the provinces other than New Brunswick shall not be subject to such dues.

125. No lands or property belonging to Canada or any province shall be liable to taxation.

126. Such portions of the duties and revenues over which the respective legislatures of Canada, Nova Scotia and New Brunswick had before the union, power of appropriation, as are by this act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this act, shall in each province form one consolidated revenue fund to be appropriated for the public service of the province.

<sup>1</sup> Can. Rev. Stat., chaps. 28, 29, 30, 31, 32, 33, etc.

As respects the provinces, their revenues arise from the proceeds of royalties from mines (chiefly valuable in Nova Scotia), the sales of Crown lands and minerals, and the subsidies granted by authority of the British North America Act for the purposes of enabling them to carry on their government. The ninety-second section authorizes the legislatures to impose direct taxation on the province in order to raise a revenue for provincial purposes, to borrow money on the sole credit of the province, and to raise money from shop, saloon, tavern and auctioneer licenses, in order to the raising of a revenue for provincial, local, or municipal purposes. When the Quebec convention sat this question of provincial revenue was one that gave the delegates the greatest difficulty. In all the provinces the sources of revenue were chiefly customs and excise duties which had to be set apart for the general government. Some of the delegates from Ontario, where there had been for many years an admirable system of municipal government in existence which provided funds for education and local improvements, saw many advantages in direct taxation; but the representatives of the other provinces could not consent to such a proposition, especially in the case of Nova Scotia, New Brunswick and Prince Edward Island, where there was no municipal system, and the people depended almost exclusively on the annual grants of the legislature for the means to meet their local necessities.<sup>1</sup> All of the delegates, in fact, felt that to force the provinces to resort to direct taxation as the only method of carrying on their government, would be probably fatal to the success of the scheme, and it was finally decided to grant annual subsidies, based on population, the relative debts, the financial position, and such other facts as should be brought fairly into the consideration of the case. These financial arrangements were incorporated with the act of union,<sup>2</sup> and necessarily entail a heavy expense

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<sup>1</sup> See speech of Hon. George Brown, *Confederation Debates*, 1865, p. 92.

<sup>2</sup> See *Can. Rev. Stat.*, c. 46.

annually on the exchequer of the dominion. In consequence of the demand that arose in Nova Scotia for "better terms," previous to and after the union, the parliament of the dominion, in the session of 1869, legislated so as to meet the difficulty that had arisen, and it was accordingly decided to grant additional allowances to the provinces, calculated on increased amounts of debt as compared with what they were allowed to enter the union.<sup>1</sup>

Manitoba, British Columbia, and Prince Edward Island also obtained similar annual subsidies in accordance with the general basis laid down in the constitution. It is from these subsidies that the provinces derive the greater part of their annual revenues. Ontario is in the most favorable position from the very considerable revenue raised from lands and timber dues. The provinces are also at times borrowers on the money market, especially Quebec, in order to meet pressing liabilities. In the maritime provinces a system of municipal institutions, except in Prince Edward Island, has been at last adopted, and the local treasury in a measure relieved; but still on account of the lavish expenditure, at times considered necessary by the legislature, there is too often a complaint that the local funds are insufficient for general purposes.

From this necessarily meagre summary of the financial methods by which the dominion and the provinces meet the large expense required for public purposes, it will be seen that there is an intimate connection between the governments that does not exist in the American union, where each state meets all its local requirements by direct taxation and is not dependent on the federal authority.

The wisdom of this policy has been more than once questioned since the union has been working itself out. As a large portion of their revenues—in certain cases the largest portion—is not derived from local sources, there has not been always,

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<sup>1</sup> See Can. Rev. Stat., c. 46.

it is believed, that effort for economical expenditure that would probably have been made if all the funds were raised from local sources, and from direct taxation as in the United States. The consequence already has been that demands have been made from time to time, on the dominion treasury for the subsidizing of railway and other schemes, which are really provincial undertakings, and which are assisted as a means of relieving the local treasury and satisfying the representatives from that section. Each province should be, as far as possible, in a position of local independence, and free from suspicion of political pressure on the central government at critical times.

The federal government executes its postal and revenue services through its own officers; but, unlike the United States, it has no courts of its own in the provinces for federal objects. Still the result is practically the same, for it can use the whole system of the administration of justice should it be necessary to resort to it. The dominion government can claim the allegiance of the people of the whole country to assist it in working out efficiently and securing those great national interests, of which it is the guardian under the constitution. It has the control of the militia, and can protect the existence of the dominion, and repress rebellion as in the case of the unfortunate disturbances in the north-west in 1886. The government of Canada has a *quasi* national character, and is bound to maintain by all the means that the constitution gives it the union into which the provinces freely entered in 1867. On the other hand, the province in many respects touches more nearly the civil and the political side of the people within its limits than the central authority with its more general or national attributes of power. The exaction of indirect taxation does not come home immediately to all classes in every day life like the tax collector who presents himself under the municipal system in vogue in the provinces. Comfort and convenience, liberty and life, civil rights and property, endless matters that daily affect a community are



directly within the jurisdiction of the provincial organisms. If the dominion should cease to-morrow to exercise its constitutional powers, the province would still remain—for it existed before the union—and its local organization could very soon be extended to embrace those powers which now belong to the central authority.

The federal structure, whatever may be its defects and weaknesses in certain details, on the whole seems well adapted to meet the wants and necessities of the people. From the foundation to the crowning apex it has many attributes of harmony and strength. It is framed on principles which, as tested by British and American experience, are calculated to assist national development and give full liberty to local institutions. At the bottom of the edifice are those parish, township, county and municipal institutions which are eminently favorable to popular freedom and local improvement. Then comes the more important provincial organization, divided into those executive, legislative and judicial authorities, which are essential to the working of all provincial constitutions. Next comes the central government, which assumes a national dignity and affords a guarantee of protection, unity and security to the whole system.

The apex of the structure is the imperial power—in other words, the Sovereign who holds her exalted position, not by the caprice of a popular vote, but with all the guarantees of permanency with which the British constitution surrounds the Throne.

### LECTURE III.

#### THE GOVERNMENT AND THE PARLIAMENT.

Sir Henry Maine, in common with other eminent writers on government, has dwelt on the fact that the framers of the existing Federal Union of the United States regarded the opinions expressed by Montesquieu in the *Esprit des Lois* as of paramount importance, and that none had more weight with the writers of the *Federalist*, that admirable series of commentaries on the constitution, than that which affirmed the essential separation of the executive, legislative and judicial powers. The lines accordingly that separate these respective departments are drawn with remarkable distinctness in the American system. Their object was to impose every possible check upon the several agencies of government, so that one could not combine with the other, to the injury of the third. In the Canadian as in all other systems that derive their origin from England, this same wise principle is carefully carried out, though not to the same extent as in the United States. The judiciary has been wisely kept entirely distinct from all other authorities since 1841, and it is now impossible for the judges to sit in the legislative and executive councils and exercise a direct influence in political affairs. In the case of the executive, however, as I shall show later on, there is a direct connection between it and the legislative department, which in many respects operates in the direction of good government and efficient legislation.

As I have already shown in a previous lecture the head of the executive authority is the Queen, who is represented by

the governor-general advised by a privy council.<sup>1</sup> The governor-general as the acting head of the executive of Canada, assembles, prorogues and dissolves parliament and assents to or reserves bills in the name of her majesty ; but, in the discharge of these and all other executive duties which are within the limits of his commission, and in conformity with the constitution, he acts entirely by and with the advice of his council who must always have the support of the house of commons. Even in matters of imperial interest affecting Canada, he consults with the council and submits their views to the colonial secretary of state in England. On Canadian questions clearly within the constitutional jurisdiction of the dominion he cannot act apart from his advisers, but is bound by their advice. Should he differ from them on some vital question of principle or policy he must either recede from his own position or be prepared to accept the great responsi-

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<sup>1</sup> B. N. A. Act, 1867, sec. 10. The provisions of this act referring to the governor-general extend and apply to the governor-general for the time being of Canada, or other the chief executive officer or administrator for the time being carrying on the government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

11. There shall be a council to aid and advise the government of Canada, to be styled the Queen's Privy Council for Canada ; and the persons who are to be members of that council shall be from time to time chosen and summoned by the governor-general and sworn in as privy councillors, and members thereof may be from time to time removed by the governor-general.

12. All powers, authorities and functions which, under any act of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of Upper Canada, Lower Canada, Canada, Nova Scotia or New Brunswick, are at the union vested in or exercisable by the respective governors or lieutenant-governors of those provinces, with the advice, or with the advice and consent, of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those governors or lieutenant-governors individually, shall, as far as the same continue in existence and capable of being exercised after the union in relation to the government of Canada, be vested in and exercisable by the governor-general, with the advice or with the advice and consent of or in conjunction with the

bility of dismissing them ; but such an alternative is an extreme exercise of authority and not in consonance with the sound constitutional practice of modern times, should his advisers have a majority in the popular branch of the legislature. Should he, however, feel compelled to resort to this extreme exercise of the royal prerogative, he must be prepared to find another body of advisers, ready to assume the full responsibility of his action and justify it before the house and country. For every act of the crown, in Canada as in England, there must be some one immediately responsible, apart from the crown itself. But a governor, like any other subject, cannot be "freed from the personal responsibility for his acts nor be allowed to excuse a violation of the law on the plea of having followed the counsels of evil advisers."<sup>1</sup> Cases may arise when the governor-general will hesitate to come to a speedy conclusion on a matter involving important consequences, and then it is quite legitimate for him to seek advice

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Queen's privy council for Canada, or any members thereof, or by the governor-general individually, as the case requires, subject nevertheless (except with respect to such as exist under acts of the parliament of Great Britain or of the parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the parliament of Canada.

13. The provisions of this act referring to the governor-general in council shall be construed as referring to the governor-general acting by and with the advice of the Queen's privy council for Canada.

14. It shall be lawful for the Queen, if her majesty thinks fit, to authorize the governor-general from time to time to appoint any person or any persons jointly or severally to be his deputy or deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the governor-general such of the powers, authorities and functions of the governor-general as the governor-general deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen ; but the appointment of such a deputy or deputies, shall not affect the exercise by the governor-general himself of any power, authority or function.

15. The command-in-chief of the land and naval militia, and of all naval and military forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

<sup>1</sup> Hearn's Government of England, p. 133.



from his official chief, the secretary of state for the colonies, even if it be a matter not immediately involving imperial interests. For instance, when a question arose in 1879 whether the governor-general ought to follow the advice of his council and dismiss the lieutenant-governor of Quebec, Lord Lorne, at the suggestion of the premier, referred the whole matter to her majesty's government for its consideration and instructions, as it involved important questions connected with the relations between the dominion and the local governments as well as the proper construction to be put on the constitution.<sup>1</sup> This case, however, shows that the government of England, in accordance with their fixed policy, will refrain from expressing any opinion upon the merits of a case of a purely Canadian interest, and will not interfere with the exercise of the undoubted powers conferred upon the governor-general by the British North America Act, for determining the same. Indeed we may even go further and say that the effect of the advice of the imperial government in this partic-

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<sup>1</sup> I refer here to a remarkable episode in the political history of Canada, (1878-1879) in which we find abundant evidence of the bitterness of party conflict in Canada. M. Letellier de St. Just was appointed lieutenant-governor of Quebec by a Liberal administration at Ottawa, and thought proper to dismiss his executive council, though it had a large majority in the legislature. The constitutionality of his action was at once sharply attacked in the dominion parliament by the Conservative party which was politically identified with the dismissed ministers, but it was only in the senate where it had a majority that a resolution was passed censuring him for an act emphatically declared to be at variance with the principles of responsible government. The conservatives soon afterwards came into power and a similar resolution was again proposed and passed by a very large majority. The government, who had not up to that time, thought it incumbent on them to assume any responsibility under section 59 of B. N. A. Act which gave them the power of dismissal, then recommended to Lord Lorne that the lieutenant-governor be dismissed; but the governor-general, as stated in the text, hesitated to accept the advice and preferred to ask instructions from the imperial authorities. In consequence of their answer, he had no other alternative than to consent to the removal of M. Letellier on the ground as set forth in the order in council, that his usefulness was gone. The cause assigned had not quite the merit of novelty, for similar language had been

ular matter must be to restrain within very narrow limits the occasions when a governor will hereafter hesitate to accept the advice of his constitutional advisers, and refer to England a question which is clearly among the powers belonging to the Canadian government. In matters affecting imperial interests, of course the governor-general is not confined by any such limitation; but it is impossible to lay down any rule available for such emergencies. The truth is, as it has been well observed by a Canadian statesman and constitutionalist<sup>1</sup> whose opinions are deserving of the highest possible respect, "that imperial interests are, under our present system of government, to be secured in matters of Canadian executive policy, not by any clause in a governor's instructions (which would be practically inoperative, and if it can be supposed to be operative would be mischievous), but by mutual good feeling and by proper consideration for imperial interests on the part of her majesty's Canadian advisers; the crown necessarily retaining all its constitutional rights and powers which would be exercisable in any emergency in which the indicated securities

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used in the case of Governor Darling who was dismissed from the governorship of Victoria by the imperial government because he "had placed himself in a position of personal antagonism towards almost all those whose antecedents pointed them out as most likely to be available in case of a change of ministry." Governor Darling's mistake, however, was not in dismissing his ministry, but in yielding to its pressure and consenting to the clearly unconstitutional course of sanctioning the levy of duties on a mere resolution of the assembly at the time in antagonism to the council. (See *Engl. Commons Pap.*, 1866, vol. L., p. 695.) M. Letellier, it may be added, obtained the assistance of a new council, which assumed the responsibility of his acts, and appealed to the people, who sustained them by a bare majority, which soon disappeared, until the party with which Mr. Letellier had brought himself into conflict came again into office, but not until after he had been dismissed. The consequences of this affair were serious, not only in creating a violent agitation for a long while but in the effect upon the unfortunate principal actor, who felt his position most keenly, and soon afterwards died.

<sup>1</sup> The Hon. Edward Blake in a dispatch to the Secretary of State, Can. Sess. P. 1887, No. 13.

might be found to fail." The official communications between the imperial government and the governor-general that have been printed since 1867 and indeed from the days of Lord Elgin, show two things very clearly : First, that the governors-general now fully recognize the obligation resting upon them of following in their entirety the principles of English constitutional government in all their relations with their cabinet affecting matters within its functions and authority ; secondly, that the imperial government never intrude their instructions on the governor-general in such matters, and while they do not directly deprecate a reference to them for advice respecting questions even within Canadian jurisdiction, yet they do not encourage it but prefer that Canadians should settle all such questions for themselves, as the logical sequence of a very complete system of local government long since granted to the dominion by the parent state.

It will, therefore, be evident that power is practically vested in the ministry and that the governor-general, unless he has to deal with imperial questions, can constitutionally perform no executive function except under the responsibility of that ministry. The royal prerogative of mercy is no longer exercised on his own judgment and responsibility, but is administered as it is in England, pursuant to the advice of the ministry.<sup>1</sup> With respect to the allowance or disallowance of provincial acts, ever since the coming into force of the British North America Act, the governor-general "has invariably decided on the advice of his ministers and has never asserted a right to decide otherwise. He has been always content to exercise this prerogative under the same constitutional limitations and restraints which apply to all other acts of executive authority in a constitutional government."<sup>2</sup>

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<sup>1</sup> In the resolutions of the Quebec convention, the prerogative of pardon was to be exercised by the lieutenant-governors of the provinces ; but in the British North America Act this important power is entrusted only to the governor-general as the direct representative of the Queen.

<sup>2</sup> Todd's *Parl. Gov't. of the Colonies*, p. 342.

Even in the exercise of the all important prerogative of dissolution, which essentially rests in the Crown, he acts on the advice of his advisers, and it is obvious from many examples in the recent political history of Canada he does not hesitate to follow that advice as a rule.<sup>1</sup> Of course it may be said that the more frequent are the opportunities given to the people to express their opinions on the policy of a government, the greater is the security granted to popular liberty, and the more likely is parliament to represent public sentiment. In 1882 parliament had been only four years in session and Lord Lorne accepted the advice of his council to dissolve parliament, but there were certainly good reasons for such a course at that time, since there had been a readjustment in the representation of the House, as a consequence of the new census taken in 1881, and the national or protective policy had been less than three years in operation and the earliest opportunity should be given to obtain thereon the verdict of the people. The difficulties that surround a governor-general in such cases, when there is a powerful party in power, are very obvious, especially when we consider that he is hardly likely to meet with support from his official superiors in England in a matter which they would consider of purely Canadian importance. Such facts obviously are the natural outcome of parliamentary government, though, in the opinion of some thoughtful publicists, they raise the question whether a governor-general, as well as the sovereign whom he represents, might not be called upon in some cases to refuse to be bound

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<sup>1</sup> Doubt has been cast upon the constitutional propriety of the course pursued in 1887, when the governor-general allowed the premier to appeal to the people, though parliament had only held four sessions and had not completed its constitutional existence of five years from the date of the return of the writs in 1882. The government of the day had a large majority in the popular branch. I cite this case simply to illustrate the extent to which the governor-general, as astute as he was able, thought himself constitutionally bound to follow the advice of his ministry in view of all the reasons submitted to him, and of which, no doubt, we have not yet full knowledge.



by such advice, and to consider whether it is party ambition or the public interest that is at stake. I need, however, hardly add that the representative of the crown must be prepared to see his action in such a grave exercise of the prerogative fully justified by another set of advisers in case he finds himself in irreconcilable conflict with those who give him advice which he cannot bring himself to follow after a thorough consideration of all the facts as they have been presented to him. Happily the relations that exist between the Queen's representative and her council are not likely to be strained while both fully appreciate their respective functions and follow those principles of action which experience and usage have shown to be necessary to prevent undue friction and difficulty. It is the duty of the council, through their premier, to instruct the governor-general thoroughly on all questions that are matters of executive action, and to keep him informed on any matter that should properly come under his cognizance. Mutual consultation can do everything to bring councillors of the crown into perfect harmony with their constitutional head; and the circumstances must be very peculiar and extraordinary indeed when a conflict can arise between these authorities that is not susceptible of an amicable arrangement at last.

Occupying a position of unswerving neutrality between opposing political parties, and having no possible object in view except to subserve the usefulness and dignity of his high office, the governor-general must necessarily, in the discharge of his important functions, have many opportunities of promoting the interests of the country over whose government he presides. While he continues to be drawn from the ranks of distinguished Englishmen, he evokes respect as a link of connection between the parent state and its dependency. In the performance of his social duties he is brought into contact with all shades of opinion and wields an influence that may elevate social life and soften the asperities of public controversy by bringing public men to meet on a neutral ground and under conditions which win their respect. In the tours

he takes from time to time throughout the wide territories of the dominion he is able to make himself acquainted with all classes and interests, and by the information he gathers in this way of the resources of the country he can make himself an important agent in the development of Canada.<sup>1</sup> In the encouragement of science, art and literature he has also a fruitful field in which he may perform invaluable service that would not be possible for anyone who does not occupy so exalted a position in the country.<sup>2</sup>

The British North America Act of 1867 provides that the council, which aids and advises the governor-general, shall be styled the "queen's privy council for Canada."<sup>3</sup> Here we have one of the many illustrations that the constitutional system of the dominion offers of the efforts of its authors to perpetuate as far as possible in this country the names and attributes of the time-honored institutions of England. The privy council of Canada recalls that ancient council whose history is always associated with that of the king as far back as the earliest days of which we have authentic record. Sometimes it was known as the *aula regia* or the *curia regis*, which possessed ill-defined but certainly large legislative and judicial as well as executive powers; but its principal duty, it is clear, was to act as an advisory body according as the king might wish its counsel. At all times in English history there appears to have been a council near the king who could assist him with their advice and be made responsible for his acts.<sup>4</sup> Too often it became

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<sup>1</sup> Lord Dufferin's public speeches during his administration in Canada directed large attention in Europe to the remarkable capabilities of Canada.

<sup>2</sup> During the régime of the Marquis of Lorne and H. R. H. the Princess Louise, the royal academy of arts and the royal society of Canada were established on a successful basis.

<sup>3</sup> The executive council of the little state of Delaware was originally called the privy council—the only example we have of such a title in the old colonies.

<sup>4</sup> "It is our good fortune to be the inheritors of institutions in which the spirit of freedom was enshrined and to have had forefathers who knew how to defend them. The king of England was a *rex politicus*, a political crea-

the unscrupulous instrument of the sovereign, and by the time of Elizabeth it had practically superseded the parliament, except when money had to be raised by the taxation of the people. But with the end of the Tudor dynasty, its power began to wane and the parliament increased in strength and influence. The Stuarts made use of it to establish a secret star chamber to usurp the functions of the courts, and we hear later of the formation of a committee called enviously a cabal or cabinet, on account of the king finding it convenient from time to time to have a small body of advisers on whose ability to serve him he could have every confidence, and in whose deliberations he could find that secrecy which would not have been possible in the consultations of the privy council as a whole. In the course of the various changes that have occurred in English constitutional history its judicial functions disappeared and now only survive in the judicial committee, while it has been practically denuded of all former executive functions, and exists only as a purely honorary and dignified body. The cabinet council—a name originating in the days of Charles I—is now the great executive and administrative council of state, though in no other respect does it resemble that irresponsible creation of the Stuart king. Still the cabinet which is the governing power of the ministry of modern times, is a name unknown to the law. The privy council is the only body legally recognized, and on the formation of a new ministry it is usual to inform the public simply that her majesty has been pleased to appoint certain members of the privy council to certain high offices of state. The cabinet, or inner council, is only a portion of the ministry

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tion, the highest functionary and servant of the state, not a merely personal ruler, and that was his recognized capacity. In the next place, from early times, earlier than the beginning of regular parliaments, the people of England held a firm hold on the idea of ministerial responsibility. They acted upon it fitfully and sometimes capriciously, but they never let it go. If the king ruled ill, it was because he had bad advisers." *Contemporary Review*, January, 1889, p. 53.

and varies in numbers according to the exigencies of state. This ministry is drawn from members of the two houses of parliament, chiefly from the house of commons, and their tenure of office depends upon their having and retaining the confidence of a majority of the people's house, in accordance with the principles of parliamentary government, which were first roughly laid down after the revolution of 1688, though it took very many years before the present system of ministerial responsibility reached its present perfection.

The terms, "cabinet," "ministry," "administration" and "government," are indifferently applied to the privy council of Canada; for there is not in this country a select cabinet as in the parent state. Privy councillors, when not in the government, retain their honorary rank, but it is simply one that entitles them to certain precedence on state occasions and has no official responsibility or meaning. When the governor-general appoints a body of advisers to assist him in the government he calls them to be members of the privy council and to hold certain offices of state. It sometimes happens, however, that ministers are appointed without a portfolio or department, and two representatives of the government in the senate are in that position at the present time. The number of members of the ministry or privy council in office vary from thirteen to fifteen of whom thirteen are heads of departments, whose functions are regulated by statute. One of these officers, however, is president of the privy council, who has practically no departmental duties, but it is a position which the premier, as it happens at the present time, may well occupy in view of his large political responsibilities as the head of the government. While holding this virtually honorary office, he is often called upon to act for ministers who are ill or absent from the country, and it is found convenient to connect with it the charge of the virtually subordinate department of Indian affairs.<sup>1</sup> The other ministers with portfolios are the

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<sup>1</sup> Sir John Macdonald was president of the council and superintendent general of Indian affairs, an office generally held by the minister of the



minister of finance, minister of public works, minister of railways and canals, minister of the interior, postmaster-general, minister of justice, secretary of state, minister of inland revenue, minister of customs, minister of militia, minister of marine and fisheries, and minister of agriculture. When we consider the population of Canada and its position as a colonial dependency this ministry of thirteen departments (exclusive of the two at present without portfolios) seems extremely large compared with the government of the United States or of England itself. At the inception of confederation it was considered advisable to have all sections of the confederation fully represented, and the practice has ever since been to maintain the proportion from the maritime provinces, Ontario and Quebec. In 1889 the exceptional position of the north-west was for the first time considered by appointing the ex-lieutenant-governor of the territories to the office of minister of the interior, who has special charge of the affairs of that wide region. It has been sometimes urged that it would have been wise had it been possible in 1867 to follow the English practice and appoint a certain number of political under-secretaries with seats in the lower house. In this way the necessity for so large a cabinet might have been obviated, and an opportunity given to train men for a higher position in the councils of the country. A step was taken in this direction in 1887 but the law so far has remained a dead letter on the statute book.<sup>1</sup>

As the members of a cabinet only occupy office while they retain the confidence of the lower house, the majority necessarily sit in that body, though there is always a certain representation (two at the present time) in the upper branch. Since the commons hold the purse strings, and directly represent the people, all the most important departments, especially of finance and revenue, must necessarily be represented in that

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interior. He acted also for Mr. Pope, minister of railways, while suffering from illness ending in death during the past session of parliament.

<sup>1</sup> Remarks of Sir John Macdonald, *Can. Hansard*, 1887, pp. 862, 863.

branch. The ministry, then, is practically a committee of the two houses. Its head is known as the premier or prime minister, who, as the leader of a political party, and from his commanding influence and ability, is in a position to lead the house of commons and control the government of the country. His title, however, is one unknown to the law, though borrowed from the English political system. It originates from the fact that he is first called upon by the sovereign (or in Canada by her representative) to form a ministry. The moment he is entrusted with this high responsibility it is for him to choose such members of his party as are likely to bring strength to the government as a political body, and capacity to the administration of public affairs. The governor-general on his recommendation appoints these men to the ministry and the occasions that can arise when he may see reasons for objecting to a particular nominee are so exceptional—indeed we have no case in our recent history—that we may practically consider the choice of colleagues by the premier as final and conclusive. As a rule, on all matters of public policy the communications between the cabinet and governor take place through the premier, its official head. If he dies or resigns the cabinet is *ex-officio* dissolved, and the ministers can only hold office until a new premier is called to the public councils by the representative of the crown. It is for the new premier then to ask them to remain in office, or to accept their resignation. In case a government is defeated in parliament, the premier must either resign or else convince the governor-general that he is entitled to a dissolution on the ground that the vote of censure does not represent the sentiment of the country. This is one of the occasions when the governor-general is called upon to exercise an important prerogative of the crown in circumstances of great delicacy ; but fortunately for him the principles that have been laid down in the course of many years in the working of the British system in England and her dependencies can hardly fail to enable him, after a full consideration of all the circumstances of the case before

him, to come to a conclusion that will satisfactorily meet the exigency. If the circumstances are such as to justify a dissolution of parliament the premier must lose no time in obtaining an expression of public opinion; and should it be apparently in his favor he must call parliament together with as little delay as possible; or if, on the other hand, the public sentiment should be unequivocally against him he should resign; for this course has been followed in recent times both in England and Canada. Strictly speaking, parliament alone should decide the fate of the ministry, but the course in question is obviously becoming one of the conventional rules of the constitution likely to be followed whenever there is a decided majority against an administration at the polls.

From what precedes it will therefore be seen that while there is a constitutional separation between the executive and legislative authorities, still it may be said that, in Canada as in England, parliament governs through an executive dependent on it. The queen is at once the head of the executive authority and the first branch of the legislative department. The responsible part of the executive authority has a place in the legislative department. It is a committee of the legislature, nominally appointed by the queen's representative, but really owing its position as a government to the majority of the legislative authority. This executive dependence on the legislature is an invaluable, in fact the fundamental principle of parliamentary government. This council thereby becomes responsible at once to crown and parliament for all questions of public policy and of public administration. In a country like ours legislation is the originating force and the representatives of the people are the proper ultimate authority in all matters of government. The importance then of having the executive authority represented in parliament and immediately amenable to it is obvious. Parliament is in a position to control the administration of the executive authority by having in its midst men who can explain and defend every act that may be questioned, who can lead the house in all important

matters of legislation,<sup>1</sup> and who can be censured or forced from office when they do wrong or show themselves incapable of conducting public affairs. By means of this check on the executive, efficiency of government and guarantees for the public welfare are secured beyond question. The people are able, through their representatives, to bring their views and opinions to bear on the executive immediately. Every branch of the public service may be closely examined, every questionable transaction sifted, and every information obtained, by the methods of parliamentary inquiry, as ministers are present to answer every question respecting the administration of their departments and to justify and defend their public policy. The value of this British system of parliamentary government can be best understood by comparing it with the American system which so completely separates the executive from the legislature. In the United States the President is irremovable, except in case of a successful impeachment, for four years, and he appoints his cabinet, who are simply heads of departments responsible to no one except himself. This cabinet may be well compared in one respect to the cabinet councils of the Stuarts, since like them its existence does not depend on the confidence or support of the legislature. Its members have no seats in either the senate or house of representatives and are in no way responsible for, or exert any direct influence on public legislation. A thoughtful American writer<sup>2</sup> comparing the two systems, shows very clearly how inferior in many respects it is to that of England or of Canada:—"It is this

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<sup>1</sup>"It is therefore the executive government which should be credited with the authorship of English legislation. We have thus an extraordinary result. The nation whose constitutional practice suggested to Montesquieu his memorable maxim concerning the executive, legislative and judicial powers, has in the course of a century falsified it. The formal executive is the true source of legislation; the formal legislature is incessantly concerned with executive government." Sir H. Maine, *Essay on the Constitution of the United States*, *Quarterly Review*, No. 313.

<sup>2</sup>Congressional government. By Woodrow Wilson.



constant possibility of party diversity between the executive and congress which so much complicates our system of government. Party government can exist only when the absolute control of administration, the appointment of its officers as well as the direction of its means and policy, is given immediately into the hands of that branch of government whose power is paramount—the representative body. . . . At the same time it is quite evident that the means which congress has of controlling the departments and of exercising any searching oversight at which it aims are limited and defective. Its intercourse with the president is restricted to the executive messages, and its intercourse with the departments has no easier channels than private consultations between executive officers and the committees, informal interviews of the ministers with individual members of the congress, and the written correspondence which the cabinet officers from time to time address to the presiding officers of the two houses at stated intervals or in response to formal resolutions of inquiry. Congress stands almost helpless outside of the departments.”<sup>1</sup>

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<sup>1</sup>Professor Bryce (*The American Commonwealth*, I., p. 304) expresses the same opinion after a thorough study of the imperfections and weaknesses of the American system: “In their efforts to establish a balance of power, the framers of the constitution so far succeeded that neither power has subjected the other. But they underrated the inconveniences which arise from the disjunction of the two chief organs of government. They relieved the administration from a duty which European ministers find exhausting and hard to reconcile with the proper performance of administrative work,—the duty of giving attendance in the legislature and taking the lead in its debates. They secured continuity of executive policy for four years at least, instead of leaving government at the mercy of fluctuating majorities in an excitable assembly. But they so narrowed the sphere of the executive as to prevent it from leading the country, or even its own party in the country. They sought to make members of congress independent, but in so doing they deprived them of some of the means which European legislatures enjoy of learning how to administer, of learning even how to legislate on administrative topics. They condemned them to be architects without science, critics without experience, censors without responsibility.” See also De Tocqueville, I., p. 124.

I have so far briefly explained some of the constitutional duties and responsibilities that rest upon the head of the executive and his advisers, and must now proceed to review the nature of the functions of the senate and house of commons, who, with the queen, constitute the parliament of Canada.<sup>1</sup>

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#### LEGISLATIVE POWER.

<sup>1</sup> B. N. A. Act, 1867, sec. 17. There shall be one parliament for Canada, consisting of the queen, an upper house styled the senate, and the house of commons.

18. The privileges, immunities and powers to be held, enjoyed and exercised by the senate and by the house of commons and by the members thereof respectively, shall be such as are from time to time defined by act of the parliament of Canada, but so that any act of the parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such act, held, enjoyed and exercised by the commons house of parliament of the United Kingdom of Great Britain and Ireland and by the members thereof.

19. The parliament of Canada shall be called together not later than six months after the union.

20. There shall be a session of the parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the parliament in one session and its first sitting in the next session.

#### *The Senate.*

21. The senate shall, subject to the provisions of this act, consist of seventy-two members, who shall be styled senators.

22. In relation to the constitution of the senate, Canada shall be deemed to consist of three divisions—

1. Ontario;

2. Quebec;

3. The Maritime Provinces, Nova Scotia and New Brunswick; which three divisions shall (subject to the provisions of this act) be equally represented in the senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; and the Maritime Provinces by twenty-four senators—twelve thereof representing Nova Scotia, and twelve thereof representing New Brunswick.

In the case of Quebec each of the twenty-four senators representing that province shall be appointed for one of twenty-four electoral divisions of Lower Canada specified in schedule A to chapter one of consolidated statutes of Canada.

23. The qualifications of a senator shall be as follows—

(1.) He shall be of the full age of thirty years.

In all countries possessing a parliamentary system, and especially in those which have copied their institutions from the British model, an upper chamber has been generally considered a necessary part of the legislative machinery. In the United States the necessity of having such a check upon the acts of the body directly representing the people, was recognized from the outset in the constitution of the congress and of every state legislature. Two houses always formed part of the provincial legislatures of British North America from 1791 until 1867, when Ontario, whose example has been followed by other provinces of the confederation, decided to confine her legislature to an elected assembly and the lieutenant-governor.

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- (2.) He shall be either a natural-born subject of the queen, or a subject of the queen, naturalized by an act of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of one of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the union or of the parliament of Canada after the union.
  - (3.) He shall be legally or equitably seized as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seized or possessed for his own use and benefit of lands or tenements held in franc-alieu or in rotture, within the province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages and incumbrances due or payable out of, or charged on or affecting the same ;
  - (4.) His real and personal property shall be together worth four thousand dollars over his debts and liabilities ;
  - (5.) He shall be resident in the province for which he is appointed ;
  - (6.) In the case of Quebec, he shall have his real property qualification in the electoral division for which he is appointed, or shall be resident in that division.

24. The governor-general shall from time to time, in the queen's name, by instrument under the great seal of Canada, summon qualified persons to the senate ; and, subject to the provisions of this act, every person so summoned shall become and be a member of the senate and a senator.

25. Such persons shall be first summoned to the senate as the queen by warrant under her majesty's royal sign manual thinks fit to approve, and their names shall be inserted in the queen's proclamation of union.

26. If at any time, on the recommendation of the governor-general, the queen thinks fit to direct that three or six members be added to the senate. the governor-general may, by summons to three or six qualified persons (as

The upper house of the Canadian parliament bears a name which goes back to the days of ancient Rome, and also invites comparison with the distinguished body which forms so important a part of the American congress; but neither in its constitution nor in its influence does it bear any analogy with those great assemblies. An eminent authority on such questions, the late Sir Henry Maine, has very truly observed that on close inspection the senates of the ancient world will be found to answer very slightly to the conception of second chambers of a legislature, but that the first real anticipation of a second chamber, armed with a veto on the proposals of a separate authority, and representing a different interest, occurs

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the case may be), representing equally the three divisions of Canada, add to the senate accordingly.

27. In case of such addition being at any time made, the governor-general shall not summon any person to the senate, except on a further like direction by the queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four senators, and no more.

28. The number of senators shall not at any time exceed seventy-eight.

29. A senator shall, subject to the provision of this act, hold his place in the senate for life.

30. A senator may, by writing under his hand, addressed to the governor-general, resign his place in the senate, and thereupon the same shall be vacant.

31. The place of a senator shall become vacant in any of the following cases:—

- (1.) If for two consecutive sessions of the parliament he fails to give his attendance in the senate:
- (2.) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience or adherence to a foreign power, or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a foreign power:
- (3.) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter:
- (4.) If he is attainted of treason, or convicted of felony or of any infamous crime:
- (5.) If he ceases to be qualified in respect of property or of residence: provided that a senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of the government of Canada while holding an office under that Government requiring his presence there.



in that much misunderstood institution, the Roman tribunate.<sup>1</sup> Nor does the Canadian senate compare in legislative authority with the American body of that name. The first is nominated by the crown for life and has limited powers even of legislation, since it cannot initiate or even amend money or revenue bills; the other, which is elected by the state legislatures for a limited

32. When a vacancy happens in the senate, by resignation, death or otherwise, the governor-general shall, by summons to a fit and qualified person, fill the vacancy.

33. If any question arises respecting the qualification of a senator or a vacancy in the senate, the same shall be heard and determined by the senate.

34. The governor-general may from time to time, by instrument under the great seal of Canada, appoint a senator to be speaker of the senate, and may remove him and appoint another in his stead.

35. Until the parliament of Canada otherwise provides, the presence of at least fifteen senators, including the speaker, shall be necessary to constitute a meeting of the senate for the exercise of its powers.

36. Questions arising in the senate shall be decided by a majority of voices, and the speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a representation, in the senate of Canada, of four members, and (notwithstanding anything in this act) in case of the admission of Newfoundland, the normal number of senators shall be seventy-six and their maximum number shall be eighty-two; but Prince Edward Island, when admitted, shall be deemed to be comprised in the third of the three divisions into which Canada is, in relation to the constitution of the senate, divided by this act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the senate shall, as vacancies occur, be reduced from twelve to ten members respectively, and the representation of each of those provinces shall not be increased at any time beyond ten, except under the provisions of this act, for the appointment of three or six additional senators under the direction of the queen.

<sup>1</sup> "The Constitution of the United States," *Quarterly Review*, No. 313. Mr. Goldwin Smith has said on this point: "The illustrious council from which the name of Senate is derived was not an upper house, but the government of the Roman Republic, having the executive practically under its control and the initiative of legislation in its hands." See *Doutre's Constitution of Canada*, p. 66.

term, has a veto on treaties and important appointments to office, can amend appropriation bills so as to increase money grants to any amount, and can sit as a court of impeachment. In one respect, however, the senate of Canada can be compared to the American house; it is a representative of the federal, as distinguished from the popular principle of representation. The three great divisions of Canada, the Maritime Provinces, Ontario and Quebec, have been each given an equal representation of twenty-four members with a view of affording a special protection to their respective interests—a protection certainly so far not called into action even in the most ordinary matters. Since 1867 the entrance of other provinces and the division of the territories into districts has brought the number of senators up to seventy-eight in all, but at no time can the maximum number exceed eighty-four, even should it be necessary to resort to the constitutional provision allowing the addition of three or six new members—a position intended to meet a grave emergency, such as a deadlock in a political crisis. The senators are appointed under the great seal of Canada by the governor-general on the recommendation of his council, and must be of the full age of thirty years, and have real and personal property worth four thousand dollars over and above their liabilities. The experience that Canada had of the working of an elective legislative council since 1854 was considered in the convention of 1864 to be such as to justify the delegates in preferring a nominated body. The great expense entailed by an electoral contest in the large districts into which the province was divided was one feature which was strongly pointed out at the conference.<sup>1</sup> It was not deemed advisable to have two bodies elected by the people, since the danger of legislative conflict was rendered more imminent. While the experience of Victoria in Australia certainly seems to support this opinion, the history of the American congress might be considered to support an argu-

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<sup>1</sup> See remarks of Hon. George Brown in *Confederation Debates*, p. 89.

ment the other way. "The object of the framers of the constitution has been, in this as in other cases, to follow the model of the British parliamentary system as far as our circumstances will permit. Hence the house of commons can alone initiate revenue or money bills, and the senate is confined by usage to a mere rejection of such measures—a rejection justified only by extraordinary circumstances. In every respect it shows the weakness of an upper house under the British system and none of the prestige that attaches to an ancient body of hereditary legislators and of judicial powers as a court of appellate jurisdiction like the house of lords. The senate, imitating the lords, tries divorce cases;<sup>1</sup> but this is a matter of convenience to which the commons agrees without objection, since under the constitution the upper house has no special privileges in this respect. It is expressly set forth in the British North America Act that the powers and privileges and immunities of the senate and house of commons cannot at any time exceed those of the English commons. As a body of legislators the senate can compare favorably with any assembly in Canada or other dependencies of England. It has within its ranks men of fine ability and large experience in commerce, finance and law; and its weakness seems inherent in the nature of its constitution. The system of the nomination by the crown—practically by the government of the day—tends to fill it with men drawn from one political party whenever a particular ministry has been long in office and fails to give it that peculiarly representative character which would enlarge its usefulness as a branch of the legislature and give it more influence in the country. It is a question worth considering whether the adoption of such changes as would make it partly nominative and partly elective would not give it greater weight in

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<sup>1</sup> In Nova Scotia, New Brunswick, Prince Edward Island and British Columbia the courts of law continue to try divorce cases, as before 1867, and parliament has not interfered with those tribunals under the power conferred upon it by the fundamental law. See Gemmill's *Parliamentary Divorce*, c. 4.

public affairs. For instance, if the provincial legislatures had the right of electing a fixed number at certain intervals, and the universities were given the same privilege, the effect would be, in the opinion of some persons, to make it more representative of provincial interests, and at the same time add to its ranks men of high culture and learning.<sup>1</sup>

But no doubt as long as our parliamentary system is modelled on the English lines, an upper house must more or less sink into inferiority when placed alongside of a popular house, which controls the treasury and decides the fate of administrations. It is in the commons necessarily that the majority of the ministers sit and the bulk of legislation is initiated. In 1888 the two houses passed one hundred and eleven bills and of these only three public bills and five private bills originated in the upper house, and the same condition of things has existed since 1867, though now and then, as in 1889, there is a spasmodic effort to introduce a few more government bills in the senate. In the session of 1888 twenty-six commons bills were amended out of the one hundred and three sent up to the upper house, and the majority of these amendments were verbal and unimportant. Under these circumstances it may well be urged that by arrangement between the two houses, as in the English parliament, a larger number of private bills should be presented in the senate,<sup>2</sup> where there is a considerable number of gentlemen whose experience and knowledge entitle them to consider banking and financial questions, and the various subjects involved in legislation.

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<sup>1</sup> In the Prussian upper house the universities are represented and the towns of a certain number of inhabitants by their mayors. In principle it is far more of a popular assembly than the English house of lords. See an interesting article in the *Nineteenth Century* (vol. XVI., No. 89) on the federal states of the world.

<sup>2</sup> As I have already shown, divorce bills invariably originate in the senate, which has recently adopted an amended set of rules under the able supervision of Senator Gowan, and the select committee to which all such bills are referred is governed by the rules of evidence and other formalities of the courts as far as possible.



For reasons already given, government measures must as a rule be introduced in the commons, but still even in this respect there might be an extension of the legislative functions of the upper chamber, and the effort made in 1889 by the government in this direction ought certainly to be continued until it becomes a practice and not a mere matter of temporary convenience. In 1887 there were only ten private bills presented in the senate out of the seventy that passed the two houses; in 1888 the figures were five out of sixty-seven, and the same state of things was shown in 1889. The majority of these bills were of a character that could have originated in the senate with a regard to the public interests and the expedition and convenience of the business of the two houses. From time to time the senate makes amendments that show how thoroughly its members understand and are competent to consider certain subjects; and the sometimes hasty legislation of the commons—hasty because that body is too often overweighted with business—is corrected greatly to the advantage of the country. This fact alone should lead to a reform in the direction indicated.

It is in the commons house that political power rests. As I have already shown, it has both legislative and executive functions, since through a committee of its own it governs the country. Like its great English prototype it represents the people, and gives full expression to the opinions of all classes and interests, to a greater degree indeed than in England itself, since it is elected on a franchise much more liberal and comprehensive. At the present time the Canadian house of commons contains two hundred and fifteen members, or about one member for every twenty thousand persons. The representation is rearranged every decennial census by act of parliament in accordance with the terms of the constitutional law. The French Canadian province has a fixed number of sixty-five members which forms the ratio of representation on which <sup>1</sup> a decennial

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<sup>1</sup> At the last census the population of Canada was given as 4,382,810 persons; it is now about 5,000,000.

readjustment is based. Each of the other provinces is assigned such a number as will leave the same proportion to the number of its population as the number sixty-five bears to the population of Quebec when ascertained by a census.<sup>1</sup> The great province of Ontario, with two millions of people, is now represented by ninety-two members, or fifty-eight more members than the state of New York, with over five millions of souls, has in the house of representatives.<sup>2</sup> Quebec has, as just

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<sup>1</sup> B. N. A. Act, 1867.

(*The House of Commons.*)

<sup>2</sup> Sec. 37. The house of commons shall, subject to the provisions of this act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia and fifteen for New Brunswick.

38. The governor-general shall from time to time, in the queen's name, by instrument under the great seal of Canada, summon and call together the house of commons.

39. A senator shall not be capable of being elected or of sitting or voting as a member of the house of commons.

(Sections 40-43 refer to electoral divisions and make temporary provisions for elections.)

44. The house of commons, on its first assembling after a general election, shall proceed with all practicable speed to elect one of its members to be speaker.

45. In case of a vacancy happening in the office of speaker, by death, resignation or otherwise, the house of commons shall, with all practicable speed, proceed to elect another of its members to be speaker.

46. The speaker shall preside at all meetings of the house of commons.

47. Until the parliament of Canada otherwise provides, in case of the absence, for any reason, of the speaker from the chair of the house of commons for a period of forty-eight consecutive hours, the house may elect another of its members to act as speaker, and the member so elected shall, during the continuance of such absence of the speaker, have and execute all the powers, privileges and duties of speaker.

48. The presence of at least twenty members of the house of commons shall be necessary to constitute a meeting of the house for the exercise of its powers; and for that purpose the speaker shall be reckoned as a member.

49. Questions arising in the house of commons shall be decided by a majority of the voices other than that of the speaker, and when the voices are equal, but not otherwise, the speaker shall have a vote.

stated, sixty-five; the maritime provinces, forty-three; and the remaining members are distributed in Manitoba, British Columbia and the territories. Previous to 1885 the franchise for the several provincial legislatures was the franchise for the house of commons; but in that year an electoral franchise act was passed by parliament for the whole dominion. It was contended, after the most protracted debate that has taken place for years in Canada on any one question, that this radical change was not justified by any public necessity, and was simply entailing an enormous expense on the treasury without returning any corresponding advantage to the country. It may be argued with truth that generally in a federal system it

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50. Every house of commons shall continue for five years from the day of the return of the writs for choosing the house (subject to be sooner dissolved by the governor-general), and no longer.

51. On the completion of the census in the year one thousand eight hundred and seventy-one and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such a manner, and from such time as the parliament of Canada from time to time provides, subject and according to the following rules:—

- (1.) Quebec shall have the fixed number of sixty-five members:
- (2.) There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained):
- (3.) In the computation of the number of members for a province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number:
- (4.) On any such readjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding readjustment of the number of members for the province is ascertained at the then latest census to be diminished by one-twentieth part or upwards:
- (5.) Such readjustment shall not take effect until the termination of the then existing parliament.

52. The number of members of the house of commons may be from time to time increased by the parliament of Canada, provided the proportionate representation of the provinces prescribed by this act is not thereby disturbed.

is desirable to use whenever practicable all the institutions of the local government in order to bring the centre and its members into as perfect harmony as possible with one another. This is the practice in the United States, where congress is elected on the franchises of the several states—a system which has been found in every way satisfactory. However, these and other arguments against the change were considered by the majority in parliament as insufficient compared with the belief that they entertained that it was expedient to have the dominion parliament perfectly independent of provincial control. The franchise, though somewhat complicated in its details, is so broad as practically to be on the very border of universal suffrage. Every intelligent, industrious man, who is a British subject by birth or naturalization and not a convict or insane or otherwise disqualified by law, is now in a position to qualify himself to vote for a member for the commons; even the Indians in the old provinces can also avail themselves of the same privilege if they come within the liberal conditions of the act. Members of the house, as well as of the senate, receive a sessional indemnity of \$1,000 in case the session extends beyond thirty days, and an allowance of ten cents a mile for travelling expenses.<sup>1</sup> No property qualification is now demanded from a member of the commons nor is he limited to a residence in the district for which he is elected, as is the case in the United States by law or usage; and should he not be able to obtain a seat in the locality or even in the province where he lives he can be returned for any constituency in the dominion. This is the British principle which tends to elevate the representation in the commons; for while as a rule members are generally elected for their own district, yet occasions may arise when the country would for some time lose the

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<sup>1</sup> In the colony of Victoria, Australia, where salaries are much higher than in Canada, members of the assembly receive \$1,500 a session, and after seven years' service passes over railways.



services of its most distinguished statesmen,<sup>1</sup> should the American rule prevail. The senators in Quebec, in view of the exceptional position of that province, must reside in their own divisions or have their property qualification therein; but while the constitutional law requires that in the case of the other provinces senators must reside within the provincial limits, yet there is no legal necessity that they should live in a particular county or district. In a country like this, with many legislative bodies, demanding the highest capacity, it would be unfortunate were there such limitations in existence as it is admitted tend in the United States to prevent the employment of the highest talent in the public service.<sup>2</sup>

The house of commons may be regarded as fairly representative of all classes and interests. The bar predominates, as is generally the case in the legislatures of this continent; but the medical profession, journalism, mercantile and agricultural pursuits contribute their quota. It is an interesting fact that a large proportion of members have been educated in the universities and colleges of the provinces, and this is especially true of the representatives from French Canada where there are a number of seminaries or colleges which very much resemble the collegiate institutes of Ontario, or the high schools of the United States, where a superior education, only inferior to that of the universities, is given to the youth of the country. Another matter worthy of mention is the fact that a good proportion of the house has served an apprenticeship in the municipal institutions of Ontario—not a few of the leading men having been wardens, reeves, or mayors.

Of the sixty-five representatives from Quebec, there are fourteen English-speaking members, chiefly from the cities and the eastern townships where a British population is still in

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<sup>1</sup> For instance, the present premier (Sir John Macdonald) when he lost his seat in Kingston, Ontario, in 1878, was immediately returned for a constituency in Manitoba, and subsequently for a seat in British Columbia.

<sup>2</sup> See Professor Bryce's comments on this point in the *American Commonwealth*, I., p. 258.

the majority. In Ontario, moreover, two of the constituencies on the border line return two members to represent the French population that is now living in those districts. To this number we must add another representative from the largely French half-breed constituency of Provencher in Manitoba.

As a matter of fact, the house of commons comprises many of the ablest men of the country trained in law and politics. In this respect it must be compared rather with the senate than with the house of representatives at Washington. Rich merchants and bankers do not as a rule seek seats on its benches, but still all classes of business find their representatives within its walls. The man who can win success and influence in the house has many objects of ambition to reward him, though he must necessarily sacrifice the many opportunities for acquiring large wealth that offer themselves to those who keep aloof from active politics. The executive has many prizes in its gift in the shape of lieutenant-governorships, judgeships, collectorships, postmasterships, and many places in the public service which do not fall within the provisions of the civil service act. Thirteen or more positions in the privy council are in view of an ambitious politician. Then there is always the senate as a place of dignity when other plans fail of achievement. The cabinet controls the public expenditures, and it is all-important to an aspiring politician to have as much money as possible spent in his constituency. All these influences help to strengthen the executive under a rigid system of party government. Party lines are very closely drawn in Canada, and the occasions are very rare and exceptional when men can afford to break loose from the trammels that bind them to a certain political body or set of opinions. In these days a strong executive can exercise a powerful control over its supporters in a legislature, perhaps more so than in England where there always exists an independent sentiment which shows itself at important crises in and out of parliament. The danger now-a-days arises not from the encroach-

ment of the royal prerogative, but from the power of the responsible executive which, nominally dependent on the legislature, can, through the influences of party government and individual ambition, make itself the master for the time being as long as it has a strong majority in parliament. The caucus<sup>1</sup> is an instrument that may be and is used to strengthen a party. The strongest ministry does not pretend to deal with important questions during a session without seeking the advice of all its supporters in parliament from time to time. The caucus is a place for strong speaking at crises of political excitement, but, with careful management, party considerations, as a rule, prevail, and occasions seldom arise when it breaks up without an understanding to support the "party" at all hazards. Dissolution is a weapon which an executive can always threaten to unsheathe, and recalcitrant followers may prefer that it should remain as long as possible in the scabbard. It is better perhaps for the public interest that the government should be strong than that it should be weak; for in the former case it can spare defections, and can afford to be determined in a political crisis. It is a misfortune, when, as in France, there are numerous political cliques and sections, incessantly warring against each other and preventing the establishment of stable administrations.

The laws enacted for the preservation of the independence of parliament and the prevention of corrupt practices at elections, are in principle and details practically those in operation in the mother country. The former law derives its origin from the statute of Queen Anne<sup>2</sup> which established the valuable principle that the acceptance by a member of the house

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<sup>1</sup> Both government and opposition hold such a caucus when necessary. We have not yet reached the perfection of the political system of primaries, conventions and caucuses in the United States; but conventions are now generally held in the different electoral districts to nominate candidates for the legislature, and there is a thorough organization of the two parties previous to a general election.

<sup>2</sup> 6 Anne, c. 7, secs. 25, 26.

of commons of an office of emolument from the crown, shall thereby vacate his seat. Members of the house when called to the government as heads of departments must at once resign their seats and be reelected, though an exchange of offices can take place between ministers after their election under the conditions laid down in the law. All officers of the public service and contractors with the government are forbidden to sit in parliament—an exception being made, as in England, of officers in the military service. Since 1874 the house has given up its jurisdiction over the trial of controverted elections, which previously had been considered by committees exposed to all the insidious influences of purely political bodies. The courts in the several provinces are now the tribunals for the trial of all such contested elections; and the results have so far in Canada, as in the parent state, been decidedly in the public interests. The laws for the prevention of bribery and corruption are exceedingly strict; and members are constantly unseated for the most trivial breaches of the law, committed by their agents through ignorance or carelessness. The expenses of candidates must be published by their legal agents after the election. The whole intent of the law is to make elections as economical as possible, and diminish corruption. A candidate may be disqualified from sitting in the commons, or voting, or holding any office in the gift of the crown for seven years, when he is proved personally guilty of bribery, and the voters in a constituency may be also severely punished by fine and imprisonment when corruption is proved against them. Yet while these grievous offences against an honest expression of public opinion are prosecuted and punished so severely, it would be too much to say that all elections are run any more in Canada than in England without a heavy drain at times on the purse of a rich candidate or on the contributions of a political party. It is safe to say, however, that our system is a vast improvement on that of the United States, and purity of elections is largely promoted compared with the state of things in old times.



The methods of business which the houses follow are well calculated to promote the efficiency of legislation and secure the satisfactory administration of public affairs. Their rules and usages are, in all essential particulars, derived from those of the English parliament, and there has been no attempt made to adopt the special rules and practice of congress in any respect. On the day parliament has been summoned by the crown to meet, the governor-general, either in person or by deputy, proceeds to the upper chamber and there seated on the throne, surrounded by a brilliant staff and the high officers of state, reads in the two languages the speech, in which his government sets forth the principal measures which they purpose to present during the session. This speech, which is a very concise and short document compared with the elaborate message of the president, is considered as soon as possible in the two houses and generally passes without opposition or amendment, since it is the modern practice to frame it in terms that will not evoke political antagonism, though of course occasions may arise when a different course will be pursued in order to test the opinion of the house on a particular policy of the administration. As soon as the formal answer to the address has been passed, the houses proceed to appoint the committees, and commence the regular business of the session. The proceedings commence every day with prayers, taken from the church of England liturgy, and are read by the speaker, alternately in English and French, in the commons, and by a paid chaplain in the senate. The rules of the two houses do not vary much with respect to the conduct of business, but more latitude is generally given to members in asking questions and in other proceedings in the senate than in the commons, where there is greater necessity for economizing time. As it is in the popular house that nearly all the business of importance is transacted I shall confine myself to such a brief review of its rules and proceedings as may be interesting and useful to a student of our legislative system.

While the committees are an important part of the legislative machinery of the Canadian parliament, still they do not occupy the place they have reached in congressional government. They are few in number, only ten, exclusive of some small committees generally appointed to consider special questions in the course of a session. The important bodies are these: The committee of public accounts, in which financial inquiries are made, and particular expenditures of the government reviewed whenever explanation or investigation is deemed to be necessary; the committee of agriculture and colonization, in which matters affecting those subjects are fully considered; the committee of privileges and elections, which explains itself; and four committees to which all private bills respecting banking and commerce, navigation and shipping, railways and canals, telephone and telegraph lines, bridges, insurance and the incorporation of companies for other purposes, are referred for full consideration. There are also two committees on which members from the two houses sit to consider the printing of documents and the library, which are matters of common interest and management. The committees vary in number from twenty-six to one hundred and sixty members. The most numerous is the railway committee which has one hundred and sixty-four members; agriculture and colonization, one hundred and eight; banking and commerce, one hundred and four; miscellaneous private bills, seventy-five. They resemble, therefore, in this respect the grand committees of the English house of commons rather than the small bodies into which congress is divided—by the speaker in the house of representatives and by ballot in the senate.<sup>1</sup> Canadian committees are appointed by a committee of selection on which the government has of course a majority; and both sides of the house are fully represented. The speaker

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<sup>1</sup>In the house of representatives there were in 1884 fifty-four standing committees; in the senate forty-one. Sixteen is the highest number on a committee in the former, eleven in the latter house.

has no concern whatever in this important matter and acts only as the presiding officer of the assembly, bound to maintain the rules and usages of parliament and to exercise the functions of his high office irrespective of all political considerations whatsoever. He is elected by the majority at the opening of a new parliament and holds his office until it is dissolved or he resigns. His functions are those of the speaker in the English commons, and in no way does he perform the political duties of the speaker of the house of representatives, who is now practically the legislative chief of the party.<sup>1</sup>

All bills must go through several stages in both houses before they can receive the assent of the governor-general and become law. The second reading is the stage when the principle of the measure should be properly considered, and it is only in committee of the whole that its clauses can be regularly discussed. All bills are considered in committee of the whole; but private bills are first sifted in one of the standing committees just mentioned, and if reported favorably they come again before the house for further examination. I may as well explain here the distinction between the two classes of bills. All measures involving questions of public interest—the criminal law, customs, post office, militia and other matters within the general powers of parliament—are styled public bills. These bills are generally brought in directly on motion by the member in charge, or on a resolution in committee of the whole whenever a public burden is imposed, on the principle that the house should have as long a time as possible to consider matters of revenue and expenditure. As the government is practically responsible for all important measures of public policy, the great bulk of public legislation is prepared and presented by them; but it is competent for any one to introduce any bill he wishes, provided it does not impose taxes or appropriate public moneys, which are questions con-

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<sup>1</sup> Congressional Government, by Woodrow Wilson, p. 108.

stitutionally within the purview of the executive alone. The order of business, laid daily on the desk of every member, is divided into government orders, public bills and orders, and private bills, besides questions put to the government, and notices of motions, all of which are taken up on particular days in accordance with the rules of the house. If a member has a bill of importance on the paper, the government will give him every assistance in passing it before the house is prorogued and even will take charge of it themselves should it be expedient. Certain days are set apart for the government business and for private members; but near the close of the session the administration control all the time, since theirs is the all-important legislation. The private bills, which always outnumber the public and government measures, are presented and passed in conformity with special rules which do not apply to the other classes. Any persons who desire the incorporation of a banking, insurance, railway, or other company, or to construct a bridge, wharf or other work, must give notice in certain journals of their intention, and then come before parliament by petition. This petition must be immediately considered by a standing committee to see if it is in accordance with the published notice and the standing orders of the house; and then, if the report is favorable, the bill is presented, read a second time, and referred to one of the committees to which it should properly go. Its consideration in that committee is the most important stage to which it is submitted; for its promoters must now show that there is no objection to its passage, and it is the duty of the committee to see that it inflicts no injury and is in conformity with the public interests. If there is opposition to the bill, full opportunity is given by the rules to the contestants to appear and set forth their case. The house, through committees of this sort, acts in a *quasi* judicial capacity. Members of the government sit on such committees and pay particular attention to all the details of legislation of this class. It will consequently be seen that the administration becomes practically responsible for the charac-



ter of all the legislation that passes parliament. The average number of measures that pass the two houses every session is one hundred and ten, of which three-fourths at least are of a private nature. The total number of bills presented as a rule during the session does not exceed one hundred and thirty, and it is therefore evident that very few desirable measures fail to become law. The fact that on the average seven thousand bills are brought every year into congress, of which not more than one thirtieth<sup>1</sup> ever becomes law, stands out in striking contrast with the limited amount of legislation in the Canadian parliament. In both countries there are legislatures to relieve the central authority of a great number of bills which otherwise would come before it. The difference between Canada and the United States with respect to population and wealth does not by any means explain this difference in point of legislation. In all probability the reason must be sought in the fact that in the Canadian, as in the British parliament, there is an administration which is immediately responsible for all important matters of public policy, and always bound to give a vigilant scrutiny to every measure that comes before the house.

The principal duty of parliament is very truly considered to be the voting of supply. From early times in English history the kings were obliged to resort to the nation and ask them to provide the money necessary to meet their financial necessities. One of the most famous statutes in England is that of 1297, which followed the great charter wrung from John at Runnymede, and declares that no tallage shall be taken without the good will and assent of archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land. Since that day, parliament has had the power of taxation. The three estates originally voted supply separately, but in the course of time the right of initiating all taxation and voting money rested with the people's representatives. In

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<sup>1</sup> Professor Bryce in the *American Commonwealth*, I., 181, 182.

Canada, as I have already shown in the second lecture, the commons houses in the various provinces, from the very commencement of legislative institutions, asserted their claims to full control over the public grants. Now for many years the rules and usages that have so long obtained in England with respect to money votes and taxes prevail in Canada and govern the relations between the two houses. The crown, with the advice of the council, recommends all appropriations of public money.<sup>1</sup> All measures of taxation can only be introduced by ministers of the crown and must be shown necessary for the public service. Appropriations and taxes are invariably first voted in committee of the whole in the shape of resolutions which, when agreed to at a subsequent stage of the house, are incorporated into bills. Permanent grants, such as ministers' or judges' salaries, are passed in this way in ordinary committees of the whole. All sums of money, however, for the service of the year, are voted every session in committee of supply, when the estimates, giving all the votes in detail, are formally laid before the house by message from the governor-general. These estimates contain several hundred votes arranged in the order of the various public services. For instance,—civil government, militia, penitentiaries, administration of justice, immigration, Indians, public works, railways and canals, quarantine and the numerous other subjects for which parliament votes annually large sums of the public money. These estimates contain the expenditures for the current and the previous year in parallel columns, for purposes of comparison, and it is the duty of the minister responsible for a particular

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<sup>1</sup> B. N. A. Act, 1867, sec. 53. Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the house of commons.

54. It shall not be lawful for the house of commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that house by message of the governor-general in the session in which such vote, resolution, address, or bill is proposed.

expenditure to give full explanations on the subject when they are demanded by the house. As every vote is carefully scanned a very considerable part of the session is occupied by debates on this important committee, over which a permanent chairman, who is also the deputy speaker, presides. When all the votes are passed in committee, then they are reported to the house, and a further opportunity given for debate, though members are permitted to speak only once at this stage. Resolutions are next passed in committee of ways and means to authorize the necessary payments out of the consolidated fund, and finally the appropriation bill, containing all the votes of supply in full, is introduced and passed through all its stages. The committee of supply votes the money, and the committee of ways and means provides the means of payment. It is in the latter committee all taxes are imposed for purposes of public revenue.

When the estimates have been brought in it is the duty of the finance minister to make his financial statement, or, in parliamentary phrase, present the "budget."<sup>1</sup> He will on this occasion review the expenditure of the past, and estimate that for the following year, give his opinion on the financial situation and lay before the house a statement of any scheme of taxation that the government may have decided on, or of any changes that may be deemed necessary in the existing tariff. One of the most important and interesting debates of the session generally takes place after the delivery of this speech.

From the beginning of the session, members ask questions of the government on every imaginable public topic, and make formal motions for papers relating to matters of general or local interest. All such motions and inquiries are made after two days' notice; for the rules are very properly framed so as to prevent surprises, and give the house due information of the business to come daily before it. But in the Canadian house,

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<sup>1</sup> From the old French word *bougette*, a bag. In making this statement, the minister *opens* the money bag of the people, figuratively speaking.

and in the English commons in a more limited sense under the new regulations adopted since "obstruction" showed its objectionable features, there are certain methods which enable members to move motions or ask questions without number, and even without notice in the Canadian commons. It is always open to a member to bring up an important question immediately—except, of course, when there is a subject under consideration—and debate it at any length on a motion for the adjournment of the house. Then, as soon as committee of supply is moved on any day, a member may make a motion on any question he wishes, unless it refers to the votes to be discussed in supply. As the rules do not permit any amendment to be made to a motion at such a stage, "the previous question," in the English parliamentary sense, is practically in force and it is possible to get a direct vote on an issue, without the evasions that amendments offer on other occasions. While in the case of all bills and other motions, amendments must be relevant to the question, members can here bring up any subject they please. This is a practice which has its historical origin in the fact that in old times, when the English parliamentary system was developing itself, the people's representatives laid down the principle that the king must redress their grievances before they should grant him the supply he asked from the nation. Those times have long since passed away and the people now fully control all taxes and expenditures, but the crown still asks for money through the council, and the commons grant it in due form. It is no longer necessary to threaten the crown with a refusal of supplies unless the people's grievances are redressed; but still they can refuse it to an unfaithful government should the necessity arise. As a matter of fact, should the government be defeated in a session before supply is voted, the house would pass only such votes as are necessary to meet the exigencies of the public service, and leave the whole question of supply open until the crisis is over and there is in office a ministry which has the confidence of the house and country. The privilege of obtaining an



expression of opinion on any question of interest, and of setting forth any public grievance is one which is often used in the Canadian house, though it has never been abused as in England. The practice of not giving the government and house notice of such motions, as in England, is objectionable, and that is practically admitted by the fact that it is now generally considered courteous to inform the ministry privately of the subject before it is formally proposed. It would, however, be clearly to the public advantage were the rules to require that the whole house should always have before it the text or at least the substance of a motion so that it may be discussed as intelligently as possible.

The houses have never been compelled by obstruction, as in England, to adopt rules for the closure of a debate, nor do they limit the length of speeches on any occasion. "The previous question" does not cut off a discussion, as in the United States, but in accordance with the old English practice, only prevents amendment to a question. The debate continues on the main question, until a vote is taken and it is decided whether it shall be put or not. If the house decide that the question be not put, then the main motion disappears from the order paper and the debate cannot continue; but if the house decide that the question be put, then the debate must cease and the vote be taken immediately. The debates of the house are conducted, as a rule, with decorum, and the occasions are relatively few when the speaker is obliged to call a member to order for the use of improper language. Many years have passed since a member has been "named" and censured by the house for unparliamentary expressions or conduct. Expulsion or suspension is unknown to these later days of Canadian parliamentary history, though cases of expelling a member just as unjustifiable as that of Wilkes can be found in the legislative annals of French Canada and Upper Canada, from 1800 to 1836. Even when party strife runs high and the debate goes on for weeks, the house shows great power of self-restraint. On the occasion of the discussion in 1885 of the dominion

electoral franchise bill, to which the opposition took very strong objection, the house had a sitting which lasted over fifty hours; but there was no exhibition of ill temper or passion, and the two contending parties simply made a great physical effort to tire each other out. The speeches on important occasions, however, are sometimes unnecessarily long; for it is not unusual for a member to take up three hours before he closes. Debates are in such cases prolonged for days and the house becomes too often the theatre for the utterance of elaborate essays instead of that incisive discussion which is best adapted to a deliberative assembly. Sometimes the house rises to the "height of a great argument" and the debate is confined closely to the subject, and to a few leading men on either side. The fact is that in the majority of cases, men speak to their constituents rather than to the house, through the medium of the official reports which are very full and give facilities for members to distribute their speeches *ad libitum* in their electoral districts. The house, however, in the ordinary proceedings and in committee of the whole, and in select committees, shows a very practical capacity for business, and in this way affords some compensation for the wordiness that too often distinguishes its debates. The opportunities for oratorical displays are few, but at times there are speeches worthy of any legislative assembly in English speaking countries, and illustrative of the high intellectual standard of some of its members. Some of the French members speak English with remarkable accuracy, and it is but rarely now that any other language is heard in important debates, since the minority feel themselves compelled to speak so as to be understood by the great majority of which the house is composed. All the motions, however, are read and all the proceedings printed, in the two languages, in accordance with the British North America Act and the rules of the two houses.<sup>1</sup>

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<sup>1</sup> B. N. A. Act, sec. 133. Either the English or the French language may be used by any person in the debates of the houses of the parliament of

In case of a division on a question, the motion is formally put by the speaker, and he calls for the "yeas" and "nays." If he cannot decide from the voices, and five members call for the names, those in favor of the question first stand up and the name of each member is called without reference to alphabetical order by the assistant clerk and recorded by the clerk on a roll before him. Then the same procedure is repeated in the case of the opposite side, and as soon as the clerk has counted up and announced the numbers, the speaker declares the motion carried or negatived as the case may be. The names are invariably recorded in alphabetical order in the journals. The whole process is very simple, and takes only about twenty minutes from the time the members are "called in" and the vote declared.

In concluding this lecture, I may briefly refer to the position of that large body of permanent officials generally known as the civil service of Canada, whose services are so valuable and indispensable to the good government of the country at large. Except in some of the smaller provinces—in Nova Scotia, for instance, until recently—there has been for half a century and more in Canada, always a general recognition of the important principle that the public servants should be irremovable except for sufficient cause, and that they should continue in office without respect to changes of political administrations. In the days previous to responsible government, this class was appointed by the governors, but since the days of Lord Metcalfe, the third governor-general of Canada after the union of 1841, who attempted in some memorable cases to ignore the advice of his ministers, judges and all public officials have been inva-

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Canada and of the houses of the legislature of Quebec; and both those languages shall be used in the respective records and journals of those houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any court of Canada established under this act, and in or from all or any of the courts of Quebec.

The acts of the parliament of Canada and of the legislature of Quebec shall be printed and published in both those languages.

riably appointed on the recommendation of the administration. There is now a law<sup>1</sup> providing for examinations for admission to and promotions in all the important departments of the public service. It is still a moot question in Canada, as in England, whether in all cases—especially in promotions—success in answering the questions of examiners is invariably the best test of a candidate's capacity for filling certain public positions—whether sometimes it does not merely illustrate an ability to “cram.” Experience in an office, in the opinion of men qualified to speak of such a subject, can most frequently prove the competency of an individual for the ordinary routine duties that the majority of public officials have to fill. Be that as it may, the educational test has at least the advantage of keeping out of the public service many undesirable men who, without some such test, would be pushed into the departments for mere political reasons. The civil service act has relieved the government to a very considerable degree of a political pressure which had seriously interfered with the efficient organization and working of the departments. Besides the minor officials appointed in accordance with the provisions of the law, there are a large number of important offices, like collectors of customs, postmasters, deputy or permanent heads of departments, which are still given as rewards for political service. The moment, however, these men are appointed and show themselves capable in the discharge of their duties, they become the servants of the people at large, and not of a particular party or administration. Recognizing their obligations in this respect, the public officials of the dominion generally keep aloof from party conflict and intrigue and confine themselves to the legitimate functions devolving upon them. When they have attained a certain age, and become incapacitated for performing their duties, they are allowed a fair superannuation

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<sup>1</sup> See Can. Rev. Stat., c. 17 (as amended by 51 V., c. 12), which regulates the salaries paid to deputy ministers and clerks according to their grade.



allowance,<sup>1</sup> in accordance with the conditions laid down in the law. In certain political emergencies there may be sometimes an inclination to use the superannuation provisions to create a vacancy to reward a follower of some political party ; but such cases are natural temptations inseparable from a system of popular government. On the whole, this superannuation allowance is an inducement to men to enter and continue in the public service, and is justified by the experience of the parent state. So much depends on the efficiency of the permanent public service in a country like Canada, where governments and ministers are constantly changing, that it seems expedient to offer every possible incentive to the best class of men to give up the greater ambitions and prizes of life, and devote their services to the government. Whatever defects may still exist in the rules and practices that regulate the public service, it is not too much to say that the permanent officials of Canada are, in general, an industrious and efficient class, in every way reflecting credit on our system of government.

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<sup>1</sup>See Can. Rev. Stat., c. 18.

## LECTURE IV.

### THE PROVINCIAL GOVERNMENTS AND LEGISLATURES.

The Provinces are so many political entities, enjoying extensive powers of local government and forming parts of a Dominion whose government possesses certain national attributes essential to the security, successful working, and permanence of the federal union, established by the British North America Act of 1867, which defines the respective jurisdictions of the federal organization and its members. These provinces vary just as do the American States in population and area. Ontario may be compared to Ohio, and Prince Edward Island to Rhode Island. British Columbia has the area of an empire, but as yet its whole population is the smallest of all the provinces. Previous to the confederation, all the provinces, except Manitoba, which was formed in 1870 out of the Northwest Territories, had a complete organization of government and legislature. The political history of Ontario and Quebec has, for convenience sake and on account of their having written constitutions since 1774, been briefly reviewed in a former lecture, and it is, therefore, only necessary to refer here to that of the smaller provinces. Nova Scotia, New Brunswick and Prince Edward Island were formerly portions of the French domain in America, but they were formally ceded to England by the treaty of Utrecht in 1714, and the treaty of Paris in 1763. There are still in certain districts a small population descended from the old French, who once tilled the fertile lands of Acadie, that ill-defined region, which comprised not only Nova Scotia and New Brunswick,

but a considerable part of the State of Maine, according to the contentions of French statesmen. None of these provinces were ever given written constitutions by the parliament of Great Britain, as we have seen was the case with old Canada; but to all intents and purposes they enjoyed, previous to 1867, as complete a system of self-government as that large province. Their constitutions must be sought in the commissions of the lieutenant-governors, despatches of the colonial secretary of state, imperial statutes, and various official documents, granting in the course of time a legislative system and responsible government.

At the time of the outbreaks in Upper and Lower Canada in 1837-8, there was still a considerable amount of dissatisfaction in the Maritime Provinces, arising from the existence of an irresponsible executive, the constant interference of the imperial government in colonial matters, and the abuse of the powers of the representative and executive bodies; but "if there was in those sections less formidable discontent and less obstruction to the regular course of government, it was because in them there was a considerable departure from the ordinary course of the colonial government, and a nearer approach to sound constitutional practice." In New Brunswick especially, "the political controversies that had been extremely bitter between the executive and legislative authorities were, to a great extent, terminated by the concession of all the revenues to the assembly."<sup>1</sup> In Prince Edward Island the political situation was aggravated by the fatal mistake, made at the very commencement of its history, of handing over all the lands to a few absentee landlords, a burning question that was not satisfactorily settled until after the island had become part of the confederation.

At the time of the confederation all the provinces enjoyed parliamentary government in as complete a sense as Canada itself, responsible government having been given to Nova

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<sup>1</sup> Lord Durham's Report, pp. 62, 63.

Scotia and New Brunswick in 1848, and to Prince Edward Island three years later. In each province there was a lieutenant-governor appointed by the crown directly, an executive responsible to the legislature, which was composed of two houses, an assembly elected by the people and a legislative council appointed by the crown, except in Prince Edward Island, where then, as now, it was elective.

It was therefore only necessary to enact in the constitution that the two provinces of Nova Scotia and New Brunswick should have the same territorial limits, and that their constitutions should remain as at the time of the union, until altered under the authority of the act. In the case, however, of Canada, it was necessary to divide it, since one of the principal objects of the federal union was to get rid of the political difficulties that had so long complicated government in Canada and separated French Canada from the western section. Consequently Canada was divided into two separate provinces as before the union of 1841, with the respective names of Quebec and Ontario, instead of Lower Canada and Upper Canada.<sup>1</sup> In

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<sup>1</sup> B. N. A. Act, 1867, sec. 5. Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia and New Brunswick.

6. The parts of the province of Canada (as it exists at the passing of this act) which formerly constituted respectively the provinces of Upper Canada and Lower Canada, shall be deemed to be severed and shall form two separate provinces. The part which formerly constituted the province of Upper Canada shall constitute the province of Ontario; and the part which formerly constituted the province of Lower Canada shall constitute the province of Quebec.

7. The provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this act.

An imperial statute passed since 1867 (B. N. A. Act, 1871) provides:

3. The parliament of Canada may from time to time, with the consent of the legislature of any province of the said dominion, increase, diminish, or otherwise alter the limits of such province, upon such terms and conditions as may be agreed to by the said legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution, or alteration of territory in relation to any province affected thereby.



view of this division, it became necessary to make special provisions for Ontario and Quebec in accordance with an address adopted in the Canadian legislature. The representatives of Upper Canada wished to have only one house, a legislative assembly, while those of Lower Canada preferred the more British and indeed the more American system of two houses. It has been urged by an eminent judge that the British North America Act carried out confederation "by first consolidating the four original provinces into one body politic, the Dominion, and then redistributing this Dominion into four provinces."<sup>1</sup> In other words the provinces were newly created by the act of union. But by no reasoning from the structure of the act, can this contention, which makes the provinces the mere creations of the statutes, and practically leaves them only such powers as are specially stated in the act, be justified. If it was so, there must have been for an instant a legislative union and a wiping out of all old powers and functions of the provincial organizations and then a redivision into four provinces with only such powers as are directly provided in the act.

The weight of authority now clearly rests with those who have always contended that in entering into the federal compact the provinces never intended to renounce their distinct and separate existence as provinces, when they became part of the confederation. This separate existence was expressly reserved for all that concerns their internal government; and in forming themselves into a federal association under political and legislative aspects, they formed a central government for inter-provincial objects only. Far from the federal authority having created the provincial powers, it is from these provincial powers that there has arisen the federal government to which the provinces ceded a portion of their rights, property and revenues.<sup>2</sup>

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<sup>1</sup> Mr. Justice Strong, *St. Catharine's Milling Company vs. The Queen*. Sup. Court R., Vol. 13, p. 605.

<sup>2</sup> An eminent constitutional lawyer, Hon. Edward Blake, has taken issue with the learned judge in the course of an exceedingly able argument he

The constitutions of the four provinces, which composed the dominion in 1867, are the same in principle and in details, except in the case of Ontario, where there is, as I have already shown, only a legislative assembly. The same may be said of the other provinces that have been brought into the union since 1867. All the provisions of the British North America Act that applied to the original provinces were, as far as possible, made applicable to the provinces of British Columbia,

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made before the judicial committee of privy council, in the case of the Queen and the St. Catharine's Milling Company, and I cannot do better than quote his exact words, which seem clearly to indicate the real character of the union: "What then was the general scheme of that act? First of all, as I have suggested, it was to create a *federal* as distinguished from a *legislative* union, a union composed of several existing and continued entities. It was not the intention of parliament to mutilate, confound and destroy the provinces mentioned in the preamble, and having done so, from their mangled remains, stewed in some legislative caldron, evoke by some legislative incantation, absolutely new provinces into an absolutely new existence. It was rather, I submit, the design and object of the act, so far as consistent with the re-division of the then province of United Canada into its old political parts, Upper and Lower Canada, and with the federal union of the four entities, Nova Scotia, New Brunswick and the reconstituted parts of old Canada, Ontario and Quebec; it was the design, I say, so far as was consistent with those objects, by gentle and considerate treatment to preserve the vital breath and continue the political existence of the old provinces. However this may be, they were being made, as has been well said, not fractions of a unit but units of a multiple. The Dominion is a multiple, and each province is a unit of that multiple, and I submit that undue stress has been laid, in the judgment of one of the learned judges below, upon the form which is said to have been adopted, of first uniting and then dividing the provinces. I submit that the motive and cause of that form was the very circumstance to which I have adverted, the necessity of the redivision of old Canada. Three provinces there were, 'four' there were to be; and the emphatic word in that clause is the word 'four.' But for the special circumstance of the redivision of old Canada, there would have been no such phrase. Again, consistently with and supporting the suggested scheme of the act, there is to be found important language with reference to the provincial institutions and rights of property which are spoken of as continued and retained, words entirely repugnant to the notion of a division and a fresh creation." See argument published in pamphlet form, Toronto, 1888.

Manitoba and Prince Edward Island, just as if they had formed part of the union in 1867.

Manitoba was given a constitution similar to that of the older provinces by an act of Canadian parliament, and it was expressly provided in the terms of union with British Columbia that the government of the dominion would consent to the introduction of responsible government into that province and that the constitution of the legislature should be amended by making a majority of its members elective.<sup>1</sup> Immediately after the union these reforms were carried out, and the province was placed on the same footing as all the other provinces. Consequently the local or provincial constitutions are now practically on an equality, so far as the executive, legislative and all essential powers of self-government are concerned ; and all of them have the authority under the fundamental law to amend their constitutions, except as regards the office of lieutenant-governor.<sup>2</sup> British Columbia and Manitoba accordingly availed themselves of their constitutional privileges, and there is now only one house, a legislative assembly, elected by the people in those provinces.

In all the provinces, at the present time, there is a very complete system of local self-government, administered under the authority of the British North America Act, and by means of the following machinery :

A lieutenant-governor appointed by the governor-general in council ;

An executive or advisory council, responsible to the legislature ;

A legislature, consisting of an elective house in all cases, with the addition of an upper chamber appointed by the crown in three provinces, and elected by the people, in one ;

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<sup>1</sup> For constitutions of provinces admitted since 1867, see for Manitoba, Can. Stat., 33 Vict., c. 3 ; Man. Stat., 39 Vict., c. 28 ; Imp. Stat. 34, 35 Vict., c. 28, sec. 6.—British Columbia, Can. Stat. for 1872, p. 34, B. C. Con. Stat., c. 42.—Prince Edward Island, Can. Stat. of 1873, p. 11.

<sup>2</sup> See *supra*, p. 47.

A provincial judiciary, composed of several courts, the judges of whom are appointed and paid by the dominion government ;

A civil service, with officers appointed by the provincial government, holding office, as a rule, during pleasure and not removed for political reasons ;

A municipal system of mayors, wardens, reeves and councillors, to provide for the purely local requirements of the cities, towns, townships, parishes and counties of every province.

The lieutenant-governor is appointed by the governor-general in council, by whom he can be dismissed for "cause assigned" which, under the constitution must be communicated to parliament.<sup>1</sup> He is therefore an officer of the dominion as well as the head of the executive council and

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<sup>1</sup> B. N. A. Act, 1867, sec. 58. For each province there shall be an officer, styled the lieutenant-governor, appointed by the governor-general in council by instrument under the great seal of Canada.

59. A lieutenant-governor shall hold office during the pleasure of the governor-general ; but any lieutenant-governor appointed after the commencement of the first session of the parliament of Canada, shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the senate and to the house of commons within one week thereafter if the parliament is then sitting, and if not then within one week after the commencement of the next session of the parliament.

60. The salaries of the lieutenant-governors shall be fixed and provided by the parliament of Canada.

61. Every lieutenant-governor shall, before assuming the duties of his office, make and subscribe before the governor-general or some person authorized by him, oaths of allegiance and office similar to those taken by the governor-general.

62. The provisions of this act, referring to the lieutenant-governor, extend and apply to the lieutenant-governor for the time being of each province or other, the chief executive officer or administrator for the time being carrying on the government of the province by whatsoever title he is designated.

67. The governor-general in council may, from time to time, appoint an administrator to execute the office and functions of lieutenant-governor during his absence, illness or other inability.



possesses, within his constitutional sphere, all the authority of a lieutenant-governor before 1867. The essential difference now in his position arises from the fact that his responsibility is to the government which appoints him, just as these high officials before the confederation were responsible immediately to the imperial authorities. He acts in accordance with the rules and conventions that govern the relations between the governor-general and his privy council. He appoints his executive council and is guided by their advice so long as they retain the confidence of the legislature. He has "an unquestionable constitutional right to dismiss his ministers, if, from any cause, he feels it incumbent upon him to do so. In the exercise of this right, as of any other of his functions, he should, of course, maintain that impartiality towards rival political parties which is essential to the proper performance of the duties of his office; and for any action he may take he is (under the fifty-ninth section of the British North America Act) directly responsible to the governor-general."<sup>1</sup> But it is quite clear that while the lieutenant-governor can dismiss his ministers, it is a right only to be exercised for a cause fully justified by the practice of sound constitutional government; and he should not for personal or political reasons, be induced to withdraw his confidence from a ministry which has an unequivocal majority in the popular branch, unless indeed there should arise some grave public emergency which would compel him to call upon another set of advisers, and ask them to support him and appeal to the people for their judgment on the question at issue. Doubts have been raised from time to time, though rarely now, compared with the earlier years of the working of our system, whether the lieutenant-governor of a province represents the crown as before the union of 1867, but it is generally admitted that in the discharge of all the executive and administrative functions that devolve constitutionally upon him and require

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<sup>1</sup> Despatch of secretary of state for the colonies in Lieutenant-Governor Letellier's case, 1879, Commons Papers 1878-79, c. 2445, pp. 127, 128.

the interposition of the crown in the province, the lieutenant-governor has all the necessary authority.

In various cases that have come before the highest courts in Canada and in England, in which the point has been argued, the weight of authority now goes to sustain the general proposition I have laid down.<sup>1</sup> In one very important argument that was heard before the courts of Canada and finally before the judicial committee of the privy council, the question arose whether it is the provincial or the dominion government that is entitled to the estates of persons dying intestate and without heirs. As every legal student knows, property which has no owner, escheats to the crown, in proper accordance with the maxim of feudal law, and, in our day, that means it becomes the property of the people. One able counsel for the provincial authorities in this case laid special emphasis on the argument that both from the legislative and executive point of view the royal prerogatives, which in England are not the personal appanage of the sovereign, but are the property of the people, and which the sovereign holds in trust to exercise them in the interests of the British nation, are equally exercised in the provinces of the queen, not more, however, to her personal profit than in the mother country, but for the people of the provinces, with respect to whom these prerogatives have not lost their character of a trust, and that, not being able to exercise them herself, she has delegated their exercise to the lieutenant-governors, who are her mandataries.<sup>2</sup> The judicial committee declared by implication that escheated lands in any province went to the provincial and not to the dominion government. Their Lordships dwelt on the clause 109,<sup>3</sup> in the constitutional act of 1867, which enacts that "all lands, mines, minerals and royalties" belong-

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<sup>1</sup> See opinion of Chief Justice Ritchie in case of *Mercer vs. the attorney-general of Ontario*. Sup. Court Rep., Vol. V, pp. 636, 638, 643.

<sup>2</sup> Attorney-general (now judge) Loranger. Sup. Court Rep., Vol. V, p. 608.

<sup>3</sup> See Bourinot's *Manual of Constitutional History*, pp. 147-151.

ing to the provinces at the time of the union shall continue to belong to those provinces. The real question, in their opinion, was as to the effect of the words, "lands, mines, minerals and royalties" taken together. The mention of "mines" and "minerals" in this context was not enough to deprive the word "royalties" of what otherwise would have been its proper force. The general subject of the whole section is "of a high political nature," it is "the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate or arise."<sup>1</sup> This decision in its entirety is properly regarded as decidedly in the direction of strengthening provincial jurisdiction on the point I have been considering.

The executive council, which is the name now given to the administration of each province, a name borrowed from the old provincial systems of government,<sup>2</sup> comprises from seven members to five in British Columbia, holding, as a rule, various provincial offices as heads of departments. Their titles vary in some cases, but generally there is in every executive council an attorney-general, a provincial secretary, and a commissioner of lands. In the cabinet of Ontario there is a minister of education, since that branch of the public service is of exceptional importance in that province in view of the great expenditure and large number of common and grammar schools, collegiate institutes, normal and model schools, besides the provincial university in Toronto. All the members of the executive council, who hold departmental and salaried offices, must vacate their seats and be reelected as in the case of the dominion ministry. The principle of ministerial responsibility to the lieutenant-governor and to the legislature is observed in the fullest sense.

<sup>1</sup> Legal News, Vol. VI, p. 244.

<sup>2</sup> The same name was applied to the old councils of the thirteen colonies.

<sup>3</sup> B. N. A. Act, 1867, sec. 63. The executive council of Ontario and Quebec shall be composed of such persons as the lieutenant-governor from

In my third lecture, I showed the importance of the powers granted by the British North America Act of 1867 to the provincial legislatures, and gave a brief statement of what I believed, from a study of the best authorities, to be the true relations between those bodies and the dominion government. It is, therefore, only necessary for me to consider here some features of the constitution of these legislatures, the election of members, the trial of controverted elections, the prevention of bribery and corruption, and the great variety of subjects that fall within their legislative jurisdiction.

time to time thinks fit, and in the first instance of the following officers, namely: the attorney-general, the secretary and registrar of the province, the treasurer of the province, the commissioner of crown lands, and the commissioner of agriculture and public works; with, in Quebec, the speaker of the legislative council and the solicitor-general.

64. The constitution of the executive authority in each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this act, continue as it exists at the union until altered under the authority of this act.

65. All powers, authorities, and functions which under any act of the parliament of Great Britain, or of the parliament of the united kingdom of Great Britain and Ireland, or of the legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the union vested in or exercisable by the respective governors or lieutenant-governors of those provinces, with the advice, or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils or with any number of members thereof, or by those governors or lieutenant-governors individually shall, as far as the same are capable of being exercised after the union in relation to the government of Ontario and Quebec, respectively, be vested in and shall or may be exercised by the lieutenant-governor of Ontario and Quebec, respectively, with the advice or with the advice and consent of, or in conjunction with the respective executive councils or any members thereof, or by the lieutenant-governor individually, as the case requires, subject nevertheless (except with respect to such as exists under the acts of the parliament of Great Britain or of the parliament of the united kingdom of Great Britain and Ireland) to be abolished or altered by the respective legislatures of Ontario and Quebec.

66. The provisions of this act referring to the lieutenant-governor in council shall be construed as referring to the lieutenant-governor of the province acting by and with the advice of the executive council thereof.



The legislatures have a duration of four years—in Quebec, of five—unless sooner dissolved by the lieutenant-governor. They are governed by the constitutional principles that obtain at Ottawa. The lieutenant-governor opens and prorogues the assembly, as in Ontario, Manitoba and British Columbia, or the assembly and the legislative council in the other provinces, with the usual formality of a speech. A speaker is elected by the majority in each assembly, or is appointed by the crown in the upper chamber.<sup>1</sup> The rules and usages that govern their proceedings are derived from those of England, and do not differ in any material respect from the procedure in the dominion parliament. The rules with respect to private bill legislation are also equally restrictive. The British North America Act applies to the speakership of the assemblies the provisions that it enacts with respect to the speakership of the commons. The legislatures of Ontario and Quebec, like the dominion parliament, must sit once every twelve months; but apart from the existing usage that supply has to be voted every twelve months, the act demands an annual session. None of the provinces have yet adopted biennial sessions in imitation of the very general practice of the state legislatures. Not

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<sup>1</sup> B. N. A. Act, 1867 :

1.—ONTARIO.

Sec. 69. There shall be a legislature for Ontario, consisting of the lieutenant-governor and of one house styled the legislative assembly of Ontario.

70. The legislative assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two electoral districts set much in the first schedule to this act.

2.—QUEBEC.

71. There shall be a legislature for Quebec, consisting of the lieutenant-governor and two houses, styled the legislative council of Quebec, and the legislative assembly of Quebec.

72. The legislative council of Quebec shall be composed of twenty-four members, to be appointed by the lieutenant-governor, in the queen's name, by instrument under the great seal of Quebec, one being appointed to represent each of the twenty-four electoral divisions of Lower Canada in this act referred to, and each holding office for ~~the~~ term of his life, unless the legislature of Quebec otherwise provides, under the provisions of this act.

only does the British practice of voting annual estimates stand in the way of this change, which would require an amendment of the provincial constitutions, but it would be hardly acceptable to an opposition in a legislature, since it would greatly strengthen an administration and lessen their responsibilities to the assembly. In the United States there is no cabinet with seats in the assemblies dependent on the vote of the majority, and biennial sessions have their advantages, but it would be in this country a radical change hardly consistent with the principles of responsible government.

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73. The qualifications of the legislative councillors of Quebec shall be the same as those of the senators for Quebec.

74. The place of a legislative councillor of Quebec shall become vacant in the cases, *mutatis mutandis*, in which the place of senator becomes vacant.

75. When a vacancy happens in the legislative council of Quebec by resignation, death or otherwise, the lieutenant-governor, in the queen's name, by instrument under the great seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

76. If any question arises respecting the qualification of a legislative councillor of Quebec, or a vacancy, in the legislative council of Quebec, the same shall be heard and determined by the legislative council.

77. The lieutenant-governor may, from time to time, by instrument under the great seal of Quebec, appoint a member of the legislative council of Quebec to be speaker thereof, and may remove him and appoint another in his stead.

78. Until the legislature of Quebec otherwise provides, the presence of at least ten members of the legislative council, including the speaker, shall be necessary to constitute a meeting for the exercise of its powers.

79. Questions arising in the legislative council of Quebec, shall be decided by a majority of voices, and the speaker shall, in all cases, have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

80. The legislative assembly of Quebec shall be composed of sixty-five members to be elected to represent the sixty-five electoral divisions or districts of Lower Canada, in this act referred to, subject to alteration thereof by the legislature of Quebec; provided that it shall not be lawful to present to the lieutenant-governor of Quebec for assent, any bill for altering the limits of any of the electoral divisions or districts mentioned in the schedule to this act, unless the second and third readings of such bill have been passed in the legislative assembly, with the concurrence of the majority of the members representing all those electoral divisions or districts, and the assent shall not be given to such bill unless an address had been

The number of members varies from ninety-one in the legislature of the most populous province of Ontario to twenty-seven in British Columbia, with the smallest population. Members of the legislative councils, where they exist, have a property qualification, except in Prince Edward Island; but the members of the assemblies need only be citizens of Canada and of the age of twenty-one years. They are elected in Ontario on a franchise which is manhood suffrage, qualified only by residence and citizenship, and the conditions of the suffrage are hardly less liberal in nearly all the provinces, and vary little

presented by the legislative assembly to the lieutenant-governor stating that it has been so passed.

### 3.—ONTARIO AND QUEBEC.

81. The legislatures of Ontario and Quebec respectively shall be called together not later than six months after the union.

82. The lieutenant-governor of Ontario and of Quebec shall, from time to time, in the Queen's name, by instrument under the great seal of the province, summon and call together the legislative assembly of the province.

83. Until the legislature of Ontario or Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec, any office, commission, or employment, permanent or temporary, at the nomination of the lieutenant-governor, to which an annual salary, or any fee, allowance, emolument or profit of any kind, or amount whatever, from the province is attached, shall not be eligible as a member of the legislative assembly of the respective province, nor shall he sit or vote as such; but nothing in this section shall make ineligible any person being a member of the executive council of the respective province, or holding any of the following offices, that is to say: the offices of attorney-general, secretary and registrar of the province, treasurer of the province, commissioner of crown lands and commissioner of agriculture, and public works; and, in Quebec, solicitor-general, or shall disqualify him to sit or vote in the house for which he is elected, provided he is elected while holding such office.

84. Until the legislatures of Ontario and Quebec respectively otherwise provide, all laws which at the union are in force in those provinces respectively relative to the following matters or any of them, namely:—the qualifications and disqualifications of persons to be elected to sit or vote as members of the assembly of Canada, the qualifications or disqualifications of voters, the duties to be taken by voters, the returning officers, their powers and duties, the proceedings at elections, the periods during which such elections may be conducted, and the trial of controverted elections and the proceedings incident thereto, the vacating of the seats of members, and the

from each other—the province of Quebec imposing in a few particulars the most restrictions and showing a decided indisposition to adopt universal suffrage. Members are paid an indemnity which varies from \$800 in Quebec to \$172 in Prince Edward Island, with a small mileage rate, in most cases, to pay travelling expenses. The laws providing for the independence of the legislature and for the prevention of bribery and corruption are fully as strict as those which are in force in the case of the dominion elections. In all cases the courts are the tribunals for the trial of controverted

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issuing and execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the respective legislative assemblies of Ontario and Quebec:

Provided, that until the legislature of Ontario otherwise provides at any election for a member of the legislative assembly of Ontario for the district of Algoma, in addition to persons qualified by the law of the province of Canada to vote, every male British subject aged twenty-one years or upwards, being a householder, shall have a vote.

85. Every legislative assembly of Ontario and every legislative assembly of Quebec shall continue for four years from the day of the return of the writs for choosing the same (subject, nevertheless, to either the legislative assembly of Ontario or the legislative assembly of Quebec being sooner dissolved by the lieutenant-governor of the province), and no longer. [Extended as respects Quebec to five years by Quebec Stat. 44-45 Vict., c. 7.]

86. There shall be a session of the legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the legislature in each province in one session and its first sitting in the next session.

87. The following provisions of this act respecting the house of commons of Canada, shall extend and apply to the legislative assemblies of Ontario and Quebec, that is to say—the provisions relating to the election of a speaker originally and on vacancies, the duties of the speaker, the absence of the speaker, the quorum, and the mode of voting, as if those provisions were here reenacted and made applicable in terms to each such legislative assembly.

#### 4.—NOVA SCOTIA AND NEW BRUNSWICK.

88. The constitution of the legislature of each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this act, continue as it exists at the union until altered under the authority of this act; and the house of assembly of New Brunswick existing at the passing of this act shall, unless sooner dissolved, continue for the period for which it was elected.



elections. It is hardly necessary to say that the demand upon the classes of men disposed to give up their time to the public service is very considerable, when we reflect upon the large representation required for the parliament and legislatures, apart from the various municipal councils in the several provinces. It has been questioned whether it was quite wise at the inception of confederation to limit the services of capable men to one legislative body, in other words, to prevent dual representation. Be this as it may, the legislatures particularly do not appear in any way inclined to have their members under the influences of the dominion parliament, but prefer being entirely independent of all other legislative authorities. It is only in the Quebec legislative council that a member can also sit in the senate, but this privilege is enjoyed only by one or two men and is very different from dual representation in two representative bodies. It is obvious, so far, that while the house of commons naturally attracts the more ambitious men, since it offers them greater prizes and a wider scope for their ambition, yet the assemblies are filled, for the most part, by men of excellent business habits and practical experience, and, in not a few cases, of conspicuous talent. As much space is given in the leading journals to the debates of the legislatures as to those of the parliament at Ottawa, and it must necessarily be so in view of the importance and variety of the questions that come every session under their cognizance. The very system which makes a government responsible to and dependent on the legislature for its continuance in power must to a great extent explain why these bodies exercise greater influence than do similar authorities in the American states, even with the right of electing senators to congress.

The subjects that come under the purview of the legislatures, from session to session, are multifarious, so extensive is the scope of their legislative powers. The very section giving them jurisdiction over property and civil rights necessarily entails legislative responsibilities which touch immediately every man, woman and child in the province.

If we take up any volume of the statutes of a province, of Ontario for instance, we shall see the truth of the observation I made in the course of the third lecture, that provincial legislation in every way more nearly affects our daily life and interests as citizens of a community than even the legislation of the dominion parliament. In the statutes for 1888 we find laws relative to probate and letters of administration, executions, mortgages, sales of chattels, solemnization of marriage, married women's real estate, benevolent, provident and other societies, liquor licenses, frauds, closing of shops and hours of labor, prevention of accidents by fires in hotels and other places and public buildings, protection of game and fur-bearing animals, protection and reformation of neglected children, agricultural exhibitions, besides a large number of private and local acts for the incorporation of insurance and other companies, for the incorporation of towns, for the issue of debentures for certain local purposes, and the multiform objects which the constitution places under provincial control. Then every session there is the distribution of the public moneys, which, as in the dominion parliament, are voted in the committee of supply, and included in an appropriation act. As I have shown,<sup>1</sup> the provincial funds are provided in a great measure from the dominion subsidies, the sale of public lands, timber licenses, and mining royalties, but each province has a potential right of direct taxation, which so far has never been directly exercised by the legislature itself. In the case of a wealthy province like Ontario, with a surplus revenue, the public expenditures are very comprehensive, and illustrate the importance of the interests involved. In 1888 there was required for civil government, \$198,745; administration of justice, \$366,476; education, \$581,412; maintenance of public institutions, \$705,664; agriculture, \$141,931; hospitals and charities, \$113,686; maintenance and repairs of government and departmental buildings, \$641,176; public buildings,

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<sup>1</sup> See *supra*, p. 73.

\$383,062; colonization roads and public works, \$157,146, the total amount of expenditure being \$3,205,804. From time to time large railway subsidies are granted for the construction of railways within the provincial limits, and this has been done lavishly in the province of Quebec. The total amount of subsidies voted by all the provinces up to 1887 for this purpose was \$19,137,720.<sup>1</sup>

The control over provincial legislation is the power of veto allowed to the dominion government, and the judgment of the courts in cases submitted to them in due course of law; matters already considered in the review of the federal system. No authority is given, however, as is the case in some American states to submit a question of constitutional jurisdiction to the provincial courts, though, as I have already shown, such a reference can be made to the supreme court of Canada.<sup>2</sup> In the few states where such a constitutional provision exists, the judges regard the reference as calling upon them simply to act in an advisory capacity and guard themselves from being bound by their opinion, in case the same question comes up for argument and judgment in due process of law.<sup>3</sup> The same principle, if I mistake not, has been laid down by the judges of the supreme court of Canada, when they have been called upon to give an opinion on private bill legislation of parliament and other constitutional points of controversy. The practice has decided advantages if it can be carried out, and

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<sup>1</sup> Canadian Handbook, by George Johnson, p. 92.

<sup>2</sup> See *supra*, p. 66.

<sup>3</sup> In Maine, New Hampshire, Massachusetts, Florida, and Rhode Island (Cooley, *Constitutional Limitations*, pp. 51, 52) "the legislative department has been empowered by the constitution to call upon the courts for their opinion upon the constitutional validity of a proposed law, in order that, if it be adjudged without warrant, the legislature may abstain from enacting it." This eminent authority doubts if such decisions can be entirely satisfactory, since they are made without the benefit of argument at the bar. They must, however, more or less operate as a check upon careless legislation and are entitled to every consideration as coming from reflective judicial minds.

it would be well to consider whether it cannot be adopted in the case of the provincial courts. Many cases, however, constantly arise in the course of law, with respect to the competency of the legislature to enact certain statutes; and every year sees the British North America Act made clearer, and supplemented by a number of valuable decisions which practically enter into our constitutional system and make it more intelligible and workable.

It is not necessary to dwell at greater length on the power of disallowance than I have already done in the third lecture, but there is one question of some interest which requires a few words of explanation, or rather of comment, since it is not quite intelligible on sound constitutional principles. The British North America Act gives the lieutenant-governor, as well as the governor-general, the power to "reserve" and also to "veto" a bill when it comes before him.<sup>1</sup> The power of reserving bills is exercised by the governor-general in very exceptional cases affecting imperial interests, but there is no instance in our parliamentary history since the concession of responsible government of the exercise of the veto—a royal prerogative, in fact, not exercised even in England since the days of Queen Anne. Lieutenant-governors not infrequently reserve bills, in all the provinces, for the consideration of the governor-general in council; and this is constitutionally justifiable; but the same functionaries in the maritime sections have occasionally vetoed bills of their respective legislatures. Their legal right is unquestionable, but it is a right clearly quite inconsistent with the general principles of British constitutional government which should govern us in all cases.

In the United States, where the power of veto is given to the president, and to all the governors of the states, with only four exceptions, the cabinet or executive officers have no responsibility whatever in matters of legislation, and the power

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<sup>1</sup>Secs. 55, 56, 90.



generally operates as a useful check on the legislatures, which otherwise would be left practically without any control on their proceedings. In the Canadian provinces, however, the case is very different, for the ministry in each is responsible to the house and to the lieutenant-governor for legislation. If any bill should pass the houses despite their opposition as an administration, it is clear that they have more or less, according to the nature of the measure, forfeited the confidence of the people's representatives, and it would be a virtual evasion of their ministerial responsibility, for them at the last moment to advise the lieutenant-governor to intervene in their behalf and exercise his prerogative. He might well question their right to advise him at all, since they had shown they had not the support of the legislature of which they were a committee. In Ontario and Quebec no ministry has ever occupied so anomalous a position, and the only explanation that can be offered for the existence of the veto in the other provinces is that by carelessness or ignorance, governments have permitted legislation, which the lieutenant-governor has found to be beyond the competency of the legislature or otherwise very objectionable, and that he has been forced to call the attention of his cabinet to the fact and ask their advice. An executive council has, under these circumstances (for I am speaking from authoritative information on this interesting point) felt itself bound to accept the situation and advise the disallowance of the bill. Under the peculiar circumstances that probably existed, the veto may at times have proved advantageous to the public interests; but looking at the nature of our government, it would be probably wiser to be content with the check which the constitutional act already imposes on improper legislation in a provincial legislature; that is, the general power of veto by the dominion government. It may be added that this is one of the cases in which a superior court in a province might well be authorized to express an opinion, as in certain American states, on the constitutionality of a measure before it passes

finally. The lieutenant-governor would then be placed in a less invidious position.<sup>1</sup>

The judiciary, like its English prototype, evokes respect in every province of Canada, for the legal attainments and high character of its members. Entirely independent of popular caprice, and removable only for cause on the address of the two houses of parliament, it occupies a very advantageous position, compared with the same body in many of the United States. While the administration of justice, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, is one of the matters within the purview of the legislatures, the government of the dominion alone appoints and provides the salaries of the judges of the superior, district and county courts, except those of the probate court in Nova Scotia and New Brunswick.<sup>2</sup> It has

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<sup>1</sup> See Bourinot's *Parliamentary Practice of Canada* (pp. 578, 581) where this question is more fully discussed.

<sup>2</sup> B. N. A. Act, 1867, sec. 96. The governor-general shall appoint the judges of the superior, district and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick and the procedure of the courts in those provinces are made uniform, the judges of the courts of those provinces appointed by the governor-general shall be selected from the respective bars of those provinces.

98. The judges of the courts of Quebec shall be selected from the bar of that province.

99. The judges of the superior courts shall hold office during good behavior, but shall be removable by the governor-general on address of the senate and house of commons.

100. The salaries, allowances and pensions of the judges of the superior, district and county courts (except the courts of probate in Nova Scotia and New Brunswick) and of the admiralty courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the parliament of Canada.

129. Except as otherwise provided by this act, all laws in force in Canada, Nova Scotia or New Brunswick at the union, and all the courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick,

been also decided that the dominion parliament is at liberty to create new courts, when public necessity may require it, for the better administration of the laws of Canada, or to assign to the jurisdiction of existing courts any further matters appropriate to their sphere of duty. For when legislating within its proper bounds, that parliament is clearly competent to require existing courts in the respective provinces, and the judges of the same, who are appointed and paid by the dominion, and removable only by address from the same parliament, to enforce their legislation. Such an "exercise of authority constitutes no invasion of the rights of the local legislatures."<sup>1</sup>

In all the provinces there is a supreme court, or court of appeal; and superior courts, known under the legal designations of high courts of justice, court of queen's bench, or superior court. Besides these tribunals of complete civil and criminal jurisdiction, there are various other courts with inferior or special functions, known as county, district, surrogate or probate, maritime<sup>2</sup> and magistrates' courts, all of whose

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respectively, as if the union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under acts of the parliament of Great Britain or of the parliament of the united kingdom of Great Britain and Ireland) to be repealed and abolished, or altered by the parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under this act.

<sup>1</sup>This judgment was given in the case of *Valin v. Langlois*, in which the validity of the dominion act imposing upon the judges the trial of dominion controverted elections was questioned. See *Can. Sup. Court Rep.*, Vol. III, p. 70. Also 5 *App. Cas.*, 115.

<sup>2</sup>The maritime court of Ontario is a dominion court, established by act of parliament, on account of the growing importance of the maritime business on the lakes. See *Can. Rev. Stat.*, c. 137; *Canada Law Times*, Vol. III, pp. 1-13.

Maritime jurisdiction over the high seas is a branch of international law which is administered throughout the British colonies by the imperial vice-admiralty courts established therein. See *Todd's Parl. Govt. in the Colonies*, p. 188.

duties are defined by statute. So far as our circumstances have permitted, the changes in the organization and procedure of the English courts have been followed in the English-speaking provinces; and this is especially true of Ontario, where the judicature act is modelled upon that of England, and provides for a supreme court of judicature, consisting of two permanent divisions, called the high court of justice for Ontario, and the court of appeal for Ontario. The first division is again divided into three parts, queen's bench, chancery and common pleas. In Ontario, as in the other English provinces, the recent practice of England has been followed, and though the title of chancellor, or judge in equity, still exists in some courts, there is a fusion of law and equity; in the high court of justice in Ontario and in the supreme court in Nova Scotia, for instance. The law provides every legitimate facility for appeals from every inferior court in a province, and causes may be taken immediately to the privy council of England; or, as generally happens, to the supreme court of Canada at Ottawa, previously to going before the court of the last resort for the empire at large.<sup>1</sup> In the organization and procedure of the courts from the earliest times since Canada became a possession of England, we can see how closely Canadians imitate her institutions in all respects. The names of the courts are for the most part identical. The justices of the peace who are still appointed by the crown, as represented by the lieutenant-governor in the provinces, date from the days of Edward III. As in England, there is no limit to the number that may be appointed in a district, and consequently in some of the provinces the privilege has been often abused by different governments, in order to satisfy the petty ambition of their friends and supporters. The courts of quarter or special sessions, which were held by the magistrates for the trial of certain causes, but especially for the imposition and expenditure of local taxes in counties, long existed in all the provinces; but with the establishment

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<sup>1</sup>See *supra*, p. 66.



of municipal institutions and the organization of county and other courts, they have practically disappeared from the legal structure, although relics of their powers still exist in the province of Quebec, where the recorders of Quebec and Montreal are judges of sessions, and in the general sessions of the peace in Ontario.

The criminal law of England has prevailed in all the provinces since it was formally introduced by the proclamation of 1764, and the Quebec act of 1774. The French Canadians never objected to this system of law, since in many respects it was more humane and equitable than their own code. The civil law, however, has continued to be the legal system in French Canada since the conquest, and has obtained a hold now in that section, which ensures its permanency as an institution closely allied with the dearest rights of the people. Its principles and maxims have been carefully collected and enacted in a code which is based on the famous code of Napoleon. The rules of procedure relating to the civil law have also been formulated in a distinct code. The civil law of French Canada had its origin like all similar systems, in the Roman law, on which were engrafted, in the course of centuries, those customs and usages which were adapted to the social condition of France. The various civil divisions of France had their special usages, which governed each, but all of them rested on the original basis of the Roman law, as compiled and codified under Justinian. The customary law of Paris became the fundamental law of Canada, and despite the changes that it has necessarily undergone in the course of time, its principles can still be traced throughout the present system as it has been codified of late years. The French civil law has been materially modified since 1763, by contact with the English laws and customs, and by the necessities and circumstances of a new country ; but still, despite all the amendments and modifications it has undergone in order to make it more in consonance with the conditions of modern life and the needs of commerce and enterprise, it displays in their

integrity all those important principles which have the sanction of ages in all those countries where a similar system prevails, and which touch the civil rights of individuals, the transfer of property, marriage and inheritance, and other matters of vital interest to all persons in a community.

In the other provinces the common law of England forms the basis of their jurisprudence. Its general principles were brought into this country, as into the United States, by the early colonists as their natural heritage; but they never adopted those parts of the law which were not suited to the new condition of things in America. It is a system replete with the principles of individual liberty and self-government and giving large scope to enterprise and energy in colonization. In addition to the body of the common law, Canada has also availed itself of those statutes which have been framed in England from time to time, in consonance with the condition of things to which the old maxims of the law could not apply. The establishment of legislatures in the provinces, we have seen, was only a little later than the entrance of the large British population, and it was therefore in their power to adapt English statutes to the circumstances of this country at the very commencement of our history, or to pass such enactments as were better suited to the circumstances of the country. Thus it happens that gradually a large body of Canadian statutory law has been built upon the common law base of the legal structure, and with a view of making the law more intelligible, it has consequently been wisely ordered, at different times since 1854, that all these statutes should be revised and consolidated by commissions composed of learned lawyers and judges. The people of the dominion and of all the provinces have now easy access to the statutory law that governs them within the respective constitutional limits of the parliament and the legislatures. It is also found convenient in the intervals between the consolidations of the statutory law to collect together, from time to time, all the enactments on a particular subject and incorporate them, with such amend-

ments as are found necessary, in one statute. This has been found especially useful in the case of laws affecting railways, insurance companies, the territorial government, and other matters of large public import. The other advantage of this practice lies in the fact that it lessens the labor of a greater consolidation at a later period. The criminal law has been consolidated in this way and forms a distinct code.

While it is only in Quebec that there is a system of municipal or civil law distinct from the common law, there are at the same time in all the other provinces certain differences in the statutory law, affecting civil rights and property, that have grown up from the commencement of their history as separate political entities, until the present time. But as the principles that lie at the basis of their private law are derived from the same source of law and are in the main identical, the authors of the constitution have granted a general authority to the parliament of the dominion to give uniformity, at any time, to the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick ; but in case of parliament making such provision, it shall not have any effect until it is formally ratified by the legislatures.<sup>1</sup> No effort has been made so far in this direction, and it is now hardly probable that the provinces would be willing to sanction such a radical change, since it would give parliament thenceforth unrestricted powers over property and civil rights. The provinces having had the enjoyment of their jurisdiction for so many years and seen how

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<sup>1</sup> B. N. A. Act, 1867, sec. 94. Notwithstanding anything in this act, the parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the courts in those three provinces, and from and after the passing of any act in that behalf, the power of the parliament of Canada to make laws in relation to any matter comprised in any such act shall, notwithstanding anything in this act, be unrestricted, but any act of the parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the legislature thereon.

closely it is identified with provincial rights and interests, would hardly now consent to place themselves in a position of entire subordination, in this important respect, to the dominion government.

The position of the judiciary of Canada may be compared with that of the federal judiciary of the United States, since the latter has a permanency and a reputation not enjoyed by the courts of all the states. The president appoints, with the approval of the senate, not only the judges of the supreme court at Washington, but the judges of the circuit and district courts. In the majority of the states, however, the judges are elected by the people, and in only four cases is there a life tenure. The average term of a judge's official life in that country is from eight to ten years; but there have been no instances of removal during that term, while they have faithfully discharged their functions. As in Canada, judges may be removed, in thirty states, upon an address of two-thirds of each branch of the legislature. Their salaries are not large: the judges of the supreme court of the United States receive \$10,000 each and the chief justice \$500 in addition; of the circuit courts, \$6,000; of the district courts, from \$3,500 to \$4,000; of the supreme courts in the states, from \$10,000 to \$2,000; the average being from \$4,000 to \$5,000.<sup>1</sup> All writers who have studied the relative positions of the American judiciary agree that the influence of the elective system, of short tenure, and of small salaries has not been always favorable to the standard of the bench in the several states. The small salaries especially deter lawyers of conspicuous ability and large practice from accepting such positions. The supreme and circuit courts of the United States, however, occupy a vantage ground from their permanency and the nature of their functions, which embrace a wider sphere of study and interest. On the whole, however, with all the disadvantages under which the state judiciary labors, it is generally admitted that the dignity

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<sup>1</sup> See Spofford's *American Almanac*, 1889.



of the office, and the general respect for the law—an inheritance from their British ancestors—tend to act as a counterpoise to the influences of which I have already been speaking. In Canada the salaries are even less than in the United States, and there are also inequalities between the provinces, which ought to be removed, and salaries generally increased. The judges of the supreme court of Canada receive \$7,000 each, and the chief justice \$8,000; the chief justices in Ontario and Quebec \$6,000, and the judges of the superior court from \$5,000 to \$3,500; the chief justices in the other provinces \$5,000, and the judges \$4,000, except in Prince Edward Island where the amounts are \$4,000 and \$3,200. The county and district judges only receive from \$2,000 to \$2,400—too small a sum for a hard worked class—but in the case of these and other judges there are sufficient sums allowed for travelling expenses. On their retirement they are entitled to a considerable annuity fixed by law. Although the salaries are small compared with what a leading lawyer can make at the bar, yet the freedom of the office from popular caprice, its tenure practically for life, its high position in the public estimation, all tend to bring to its ranks men of learning and character. Since those deplorable times in Canadian history when there was a departure from the wise principle of having the executive and judicial department in separate hands, the bench has evoked respect and confidence; and there have been no cases of the removal of a judge on the address of the two houses. It says much for the different governments of Canada, and especially for the present premier<sup>1</sup> who, more than any other Canadian statesman, has had the responsibility of such important appointments through his long tenure of office, that they have never been led for political reasons to lower the standard of the bench by the elevation of improper persons. Such positions are not necessarily given as a reward for political services; for in numerous instances the ablest men have been chosen from

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<sup>1</sup> The Right Honorable Sir John A. Macdonald, P. C., G. C. B.

the bar without reference to their political status. The legislative arena, however, necessarily attracts not a few of the finest intellects of the bar in all the provinces, and the very experience they there gain of legislation is undoubtedly favorable to their usefulness, should they, as often happens, accept the dignified and relatively comfortable (that is compared with active political life) position of a seat on the bench in whose meritorious history all of us take a very proper pride.

I must now direct your attention briefly to the important place occupied by local self-government in the provincial structure. In the days of the French regime, as I have already shown you, a system of centralization was established by Louis Quatorze, who so pitilessly during his reign enforced "that dependence which," as Saint Simon tells us, "reduced all to subjection," everything like local freedom was stifled, and the most insignificant matters of local concern were kept under the direct control of the council and especially of the intendant at Quebec. Until 1841 the legislature of Quebec was practically a municipal council for the whole province, and the objection of the *habitants* to any measure of local taxation prevented the adoption of a workable municipal system until after the union of 1841. In Upper Canada, however, the legislature was gradually relieved of many works and matters of local interest by the adoption of measures of local government which infused a spirit of energy and enterprise in the various counties, towns and cities. The union of 1841 led to the introduction of municipal institutions in both the provinces, in conformity with the political and material development of the country. By 1867 there was an exceedingly liberal system in operation in Upper and Lower Canada, but the same thing cannot be said of the maritime provinces. It has been only within a few years that the legislatures of Nova Scotia and New Brunswick have organized an effective municipal system, on the basis of that so successfully adopted for a long time in the larger provinces. In Prince Edward Island, however, matters remain pretty much as they were half a cen-

tury ago, and the legislature is practically a municipal council for the whole island. At the present time all the provinces, with this one exception, have an excellent municipal code, which enables every defined district, large or small, to carry on efficiently all those public improvements essential to the comfort, convenience, and general necessities of the different communities that make up the province at large. Even in the territories of the North-west, every proper facility is given to the people in every populous district, or town, to organize a system equal to all their local requirements.<sup>1</sup>

The municipal institutions of Canada are the creation of the respective legislatures of Canada, and may be amended or even abolished under the powers granted to that body by the ninety-second section of the fundamental law. The various statutes in force establish councils composed of wardens, reeves, mayors, and councillors or aldermen, in every county, township or parish, town and city in the provinces. These councils are representative in their nature, in accordance with the principle that rests at the basis of our general system of local government. The wardens and reeves are elected as a rule by the council, and the mayors directly by the rate payers in cities. The powers and authorities of the various municipalities are regulated by general statutes, but there are also special acts of incorporation in the case of many cities and towns. These various municipal organizations have the power of imposing direct taxes for municipal purposes, including public schools, and all other objects that fall within the legitimate scope of their local requirements. Taxation is limited to a certain rate on the dollar, and is imposed on real property, as well as on bonds, stocks, and other personal property, and on incomes in the province of Ontario. All the municipalities have large borrowing powers, and the right to issue debentures to meet debts and liabilities incurred for necessary improvements, or

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<sup>1</sup> See Bourinot's *Local Government in Canada*, in Johns Hopkins University Studies.

to assist railways of local advantage. This power of assisting railways by subsidies has been largely used, though chiefly in Ontario; by the end of 1884 the municipalities had already paid \$12,472,000 to secure railway communication. The councils, however, cannot directly grant this aid, but must pass by-laws setting forth the conditions of the grant and the means of meeting the prospective liabilities, and submit them to the vote of the rate-payers, of whom a majority must approve the proposition. The reference to the people at the polls of such by-laws is one of the few examples which our system of government offers of a resemblance to the *referendum* of laws passed by the Swiss federal legislature to the people for acceptance or rejection at the polls. It is a practice peculiar to municipal bodies, though the same principle is illustrated in the case of the Canada Temperance Act, which was passed by the dominion parliament, and can only come into operation with the consent or at the option of the community to which it is referred, in accordance with the provisions laid down in the statute. Even after it has been adopted it may also be repealed by submitting the question again to the people immediately interested, as in fact we have seen done in so many cases during the last few months, on account of the unpopularity or the unsatisfactory operation of the law. It is an interesting question how far it is competent for a legislative body entrusted with the power of making laws to refer the adoption or rejection of a general law like that of the Temperance Act to the people of the whole province or of a particular district. A very high American authority has well said that "it is not always essential that a legislative act should be a competent statute which must in any event take effect as law at the time it leaves the hand of the legislative department. A statute may be *conditional*, and its taking effect may be made to depend upon some subsequent event." The highest courts have declared this local option law of Canada as within the competency of parliament under the powers granted it by the constitution, but in any case it does not appear to be any surrender of the law-making power to



submit simply the question of its acceptance to the voters of the locality especially interested in such questions. To cite again the eminent author just quoted: "Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not, at their option. A private act of incorporation cannot be forced upon the corporation; they may refuse the franchise if they so choose. In these cases the legislative act is regarded as complete when it has passed through the constitutional formalities necessary to perfect legislation, notwithstanding its actually going in operation as law may depend upon its subsequent acceptance."

The necessity of submitting by-laws to the people in a municipality, however, rests on the constitutional authority of the legislature which, in the general law passed for the regulation of municipalities, has thought proper to provide such means of reference to the rate-payers of a locality. On general principles, indeed, the powers of legislation bestowed in this way on municipal corporations cannot be considered "as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. As municipal organizations are mere auxiliaries of the state or provincial government in the important business of municipal rule, the legislature may create them at will from its own views of propriety or necessity and without consulting the parties interested; and it also possesses the like power to abolish them, without stopping to inquire what may be the desire of the corporation on that subject."<sup>1</sup>

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<sup>1</sup> All these citations are from Cooley's *Constitutional Limitations* (pp. 139-148) where the whole subject is fully discussed. His remarks apply to Canada as well as to the United States.

Of the right of the provincial legislatures to delegate powers specially given them by the constitution to any body or authority also created by themselves, we have a decision of the privy council in the case of the liquor license act of Ontario (the most important yet given by that tribunal on the constitutional jurisdiction of the provinces), which authorized certain license commissioners to pass resolutions regulating and determining within a municipality the sale of liquors.<sup>1</sup> The maxim *delegatus non potest delegare* was distinctly relied upon by the opponents of the measure, but the judicial committee emphatically laid down that such an objection is founded on an entire misconception of the true character and position of the provincial legislatures. Within the limits of its constitutional powers "the local legislature is supreme and has the same authority as the imperial parliament, or the parliament of the dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to the subjects specified in the enactment, and with the object of carrying the enactment into operation and effect." Such an authority is, in their opinion, "ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail." A legislature in committing important regulations to agents or delegates, it is decisively stated, does not by any means efface itself; for "it retains its powers intact and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands." And how far it "shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide."<sup>2</sup>

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<sup>1</sup> See *supra*, p. 54.

See 9 App. Cas., 117; or Legal News, Vol. VII, p. 23. The learned judgment of the Ontario court of appeal in this famous case contains abundance

The power of passing by-laws and imposing taxation accordingly gives to the various municipal councils of the provinces a decided legislative character. The subjects embraced within their jurisdiction are set forth with more or less distinctness in the municipal acts of the provinces, especially of Ontario. The council of every township, city, town or incorporated village may pass by-laws for the construction and maintenance of waterworks, the amounts required to be collected under local improvement by-laws, licensing and regulating transient traders, the purchase of real property for the erection of public school houses thereon, cemeteries, their improvement and protection, cruelty to animals, fences, exhibitions and places of amusement, planting and preservation of trees, gas and water companies, public morals, giving intoxicating liquor to minors, nuisances, sewerage and drainage, inspection of meat and milk, contagious diseases, fevers, prevention of accidents by fire, aiding schools, endowing fellowships, markets, police, industrial farms, charities and numerous other subjects immediately connected with the security and comfort of the people in every community.<sup>1</sup> The most important duty of every municipality, especially in the cities, is the imposition and collection of taxes. The burden of taxation is on real property, and the difficulty is felt in the same measure in Canada as in the United States of obtaining accurate returns for taxation purposes, of all intangible property in the shape of bonds, mortgages, and other securities held by individuals. The same may be said of returns of incomes, except in the case of public officials and clerks, of whose salaries it is easy to obtain information.<sup>2</sup> The statistics of this kind of property,

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of precedents for legislation entrusting a limited discretionary authority to others, and gives many illustrations of its necessity and convenience.

<sup>1</sup> See Rev. Stat. of Ontario, 1887, chap. 184, for examples of the large powers entrusted to municipalities in probably the best constructed municipal system in the world.

<sup>2</sup> The official incomes of the officers of the dominion government cannot be taxed by the provinces or the municipalities thereof. *Leprohon v. City of Ottawa*, 2 App. Rep. Ont., p. 522.

as given in assessment rolls, are very unreliable. For instance, we find that while the assessed value of real property in Ontario increased from \$325,484,116 in 1873 to \$583,231,133 in 1883, the assessed value of the personal property only increased during the same period of prosperity from \$49,010,772 to \$56,471,661; and it must be remembered that the assessors, especially in rural districts, generally place the value of real property at a low rate. The exemptions from taxation comprise all government and public property, places of worship and lands connected therewith, and a great number of buildings occupied by scientific, educational, and charitable institutions. In the province of Quebec, where the Church of Rome has accumulated a vast amount of valuable property, especially in and near Quebec and on the island of Montreal, the value of exemptions is estimated at many millions of dollars. In Ontario an agitation has commenced against the continuance of a law which restricts the assessment in certain localities to relatively narrow limits, but the religious and other interests that would be effected are likely to prevent any change for a long time to come. In Quebec it is quite impracticable.

The municipal system on the whole is creditable to the people of Canada. It has its weaknesses, owing in some measure to the disinclination of leading citizens, especially in the cities and large towns, to give much of their time to municipal duties, although every person is so deeply interested in their efficient and honest performance. Jobbery and corruption are, however, not conspicuous characteristics of municipal organizations in the provinces; and we have no examples happily in our history at all inviting comparison with the utter baseness of the Tweed ring in New York. In the rural municipalities of Ontario there is a greater readiness than in the large cities to serve in the municipal councils, and as I have already shown, those bodies have given not a few able and practical men to parliament. On an effective system of local self-government rests in a very considerable degree the



satisfactory working of our whole provincial organization. It brings men into active connection with the practical side of the life of a community and educates them for a larger though not more useful sphere of public life.<sup>1</sup>

The Territories of Canada, to whose organization I must now refer, comprise a vast region stretching from the province of Manitoba to the Rocky Mountains, and from the frontier of the United States to the waters of the North. It embraces more than two-thirds of the dominion, probably 2,600,000 square miles, and is watered by the Red, Saskatchewan, Assiniboine, Peace, Mackenzie and other rivers of large size and navigable for the most part by steamers of low draft. This region came into the possession of Canada by a purchase of the rights of the Hudson's Bay Company,<sup>2</sup> who had so long enjoyed a monopoly of the fur trade, and used their best efforts to keep it a *terra incognita*. The government of the dominion now holds complete jurisdiction over the territory, out of whose fertile lands must, sooner or later, be developed ten or twelve provinces as rich and prosperous as any of the great north-western states. The provisional district of Keewatin was formed some years ago out of the eastern portion until the settlement of the boundary dispute between Ontario and the Dominion; but since that question was settled it has only a nominal existence, though it still remains under the supervision of the lieutenant-governor of the province of Manitoba. In 1882 a large portion of the north-west region was divided

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<sup>1</sup> "I have dwelt," says John Stuart Mill, in *Representative Government*, ch. xv, "in strong language on the importance of that portion of the operation of free institutions which may be called the public education of the citizens. Now of this education the local administrative institutions are the chief instruments."

<sup>2</sup> B. N. A. Act, 1867, sec. 146, provides for admission of Territories. See also *Imp. Stat.*, 31 and 32 Vict., c. 105, (*Can. Stat. for 1869*); *Can. Commons Jour.*, 1869, pp. 149, 156; *Can. Stat.*, 32 and 33 Vict., c. 3; *Imp. Stat.*, 34 and 35 Vict., c. 28.

into four districts for postal and other purposes.<sup>1</sup> Assiniboia, now the most populous district, contains about 95,000 square miles; Saskatchewan, 114,000; Alberta, 100,000; and Athabasca, 122,000. Beyond these districts lies an immense and relatively unknown region, watered by the Peace, Slave and Mackenzie rivers, and believed to be capable of raising cereals and supporting a large population. The total number of settlers, who have mostly come into the country within six years, does not exceed forty thousand souls, scattered over a wide region; but villages and towns are springing up with great rapidity throughout the west, and immigration is flowing over the rich wheat-producing prairies of the district of Assiniboia. The authorities at Ottawa control the government of the territories. Until the winter of 1888, they were governed by a lieutenant-governor and council, partly nominated by the governor-general in council and partly elected by the people. In the session of 1888, the parliament of Canada passed an act granting the territories a legislative assembly of twenty-two members, but they do not enjoy responsible government like the provinces. The lieutenant-governor, who is appointed by the governor in council, for four years, has, however, the right of choosing from the assembly four members to act as an advisory council in matters of finance. Three of the judges of the territories sit in the assembly as legal experts, to give their opinion on legal and constitutional questions as they arise; but while they may take part in the debates they cannot vote. The assembly

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<sup>1</sup> B. N. A. Act of 1871 (amending that of 1867 in order to remove certain doubts as to the powers of Canadian parliament) enacts:

2. The parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may at the time of such establishment make provision for the constitution and administration of any such province and for the passing of laws for the peace, order and good government of such province, and for its representation in the said parliament.

has a duration of three years and is called together at such time as the lieutenant-governor appoints. It elects its own speaker and is governed by rules and usages similar to those that prevail in the assemblies of the provinces. Each member receives \$500, the legal experts \$250, a session, besides an allowance for travelling expenses. The parliament of Canada provides nearly all the funds necessary for carrying on the government and meeting necessary expenses for local purposes. The elections are by open voting; the electors must be *bonâ fide* male residents and householders of adult age, who are not aliens or unenfranchised Indians, and who have resided within the district for twelve months before the election. The civil and criminal laws of England are in force in the territories, so far as they can be made applicable; and the lieutenant-governor and assembly have such powers to make ordinances for the government of the North-west as the governor-general in council confers upon them; but their powers cannot at any time exceed those conferred by the constitutional act upon the provincial legislatures. There is a supreme court, composed of five judges, appointed by the Ottawa government, and removable upon the address of the senate and house of commons. The court has, within the territories, and for the administration of the law, all such powers as are incident to a superior court of civil and criminal jurisdiction.<sup>1</sup> The territories are represented in the senate by two senators and in the house of commons by four members, who vote and have all the other privileges of the representatives of the provinces. In this respect the territories of Canada enjoy advantages over those of the United States territories, which are not represented in the senate, but have only delegates in the house of representatives without the right of voting. Year by year, as the population increases, the people must have their political franchises enlarged. The time has come for introducing the ballot, and the inhabitants are an exceedingly intelligent class, drawn for

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<sup>1</sup> Can. Rev. Stat., chs. 7, 50; Can. Stat., 1887, ch. 3; 1888, ch. 19.

the most part, so far, from Ontario and the other English provinces, and are in every way deserving of governing themselves in all local matters, with as little interference as possible from the central authority.

There are in the territories some 30,000 Indians, chiefly Assiniboines, Crees, Bloods, and Blackfeet, in various stages of development. They are the wards of the Canadian government, which has always exercised a paternal care over them. They are fed and clothed in large numbers. Before lands were laid out for settlement, the Indian titles were extinguished by treaties of purchase, conducted between the representatives of the dominion and the councils of the several tribes. The Indians live on reserves set apart for them in valuable districts; schools and farm instruction are provided by the government, with the creditable hope of making them more useful members of the community. Agents live on the reserves, and inspectors visit the agencies from time to time to see that the interests of the Indians are protected in accordance with the general policy of the government. The sale of spirituous liquors is expressly forbidden in the territories, chiefly with the view of saving the Indians from their baneful influences.<sup>1</sup> The liberal policy of the government with respect to the Indians is deserving of the encomiums which it has received from all those who have studied its operation. So far as I can judge from careful inquiry, the effects of the policy are on the whole excellent, and Indians generally are every way gaining greater confidence in the government of the country. Of course it is difficult, if not impossible, in the great majority of cases, to make a decided radical change in the habits of the older Indians, and educate them to become competitors of the white man in industrial pursuits; but it is gratifying to find that so large a number are already tilling the soil with a moderate and, for them, an encouraging measure of success. The schools established by the government are well patronized, and on all sides, in short,

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<sup>1</sup> See Can. Rev. Stat., c. 43, regulating all matters respecting the Indians.



I see much hope for the future generations of the Indian race in the territories of Canada. At all events, good must continue to arise from the operation of the established policy, and Canadians will always feel that they have done their duty towards a race which has never in the past been treated with similar generosity and kindness in the territories of the United States.

A federal government controlling all matters essential to the general development, the permanency, and the unity of the whole dominion, and several provincial governments having complete jurisdiction over all subjects intimately connected with the comfort and convenience, the life and property, the happiness and prosperity of the various communities of people that dwell within the limits of these local organizations; these are the dominant features of the federal structure. Elements of weakness may exist in the financial basis on which the structure rests, and in the veto power given to the central authority over the acts of the provincial governments. The upper houses of the legislatures have none of the strength and influence of the senates of the United States, and can exercise, under their present constitution, relatively little of that control over the legislation of a popular house which may be found useful at critical times. Apart from what are considered constitutional defects and sources of conflict between the central and provincial authorities, there are other conditions of their political system which may awake serious apprehensions in the minds of thoughtful publicists and statesmen. An eminent English thinker, Professor Seeley, has said that "there are in general three forces by which states are held together, community of race, community of religion, and community of interest."<sup>1</sup> When we come to make an application of this doctrine to Canada, we see that there is one large province under the direct, practically unrestricted, control of a large and rapidly increasing population, speaking a language, professing a reli-

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<sup>1</sup> Expansion of England, p. 50.

gion, and retaining certain institutions, different from those of the majority of the people of the dominion. I have already shown the remarkable influence this French race has naturally exercised over the conditions of our political existence, and in the formation of our constitutional system. From time to time in our history such antagonisms as must always arise when there are racial and religious differences in a community, have shown themselves with more or less intensity. As I have already shown in the first lecture, this antagonism led to unhappy results in our early annals, and left a sad blot on our political history. In these later times, with the development of civil liberty and with a wiser understanding of the principles that should govern communities, living under the same system of government, the instances have been few and relatively unimportant, when a conflict of opinion has arisen between the two races that inhabit Canada. Our political history for half a century has been eminently creditable to the good temper, patience and moderation of the leading men in French as well as in English Canada. At critical moments conciliatory counsels have invariably prevailed in the end over the dictates of unreason and passion. All people and communities within the dominion have already learned that in the parliament they can always find every consideration and justice given to their fair and legitimate claims. No one can foresee the time when an amalgamation of the two races will be possible, when the language and institutions of French Canada will disappear. It may be there are those in English Canada who regret that there are no signs as yet of such an effacement. It seems inevitable that the great energy and colonizing capacity of English speaking peoples will obtain the supremacy, and open up and control the provinces that must soon be carved out of the great territories of the North-west; and the French Canadian race will find itself in a far smaller minority than at present. But there is no reason to suppose that it will ever cease to be an important influence in the confederation, which the Canadians, irrespec-

tive of race and religion, are establishing in a continuous line of provinces from the Atlantic to the Pacific shores. Though there are differences in language and certain institutions between the French and English Canadian peoples, yet there is an equal community of interest between both. Our history for more than a century gives us very clear illustrations of the thorough appreciation that both races have of this identity of interest. They have labored with equal patriotism to build up the confederation and develop its resources. The results of this union of races in the work of strengthening and promoting the welfare of the dominion has so far been eminently encouraging. A large intercolonial trade has been developed, railways have spanned the continent, and public works of equally national importance have been completed, and numerous other measures passed, all in the direction of consolidating the union. The foundations of a new nationality have been already laid by the common efforts of the two races, united as they are by the strong ties of a common interest; and as long as they continue to pursue the same wise policy of mutual compromise and mutual forbearance on all occasions of difference, it is impossible to exaggerate the possibilities that seem open to a dominion in the possession of institutions so fully worthy of the respect and confidence of its people.

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OF

## Johns Hopkins University Studies

IN

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